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No. 08-1106

In The Supreme Court of the United States

ELLY GROSS, et al.,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Berlin Agreements, Holocaust victims dismissed claims against German corporations, in return for respondents' promise to pay 5 billion deutschmarks ("DM"), plus "at least" DM 100 million in "interest," to a German Foundation for distribution to the victims. Petitioners allege that over DM 250 million in interest is payable as a result of respondents' 18 month delay in payment. The ruling below, holding respondents' financial promise judicially unenforceable, raises the following questions:

1. Whether the decision below is contrary to *American Insurance Ass'n v. Garamendi,* 539 U.S. 396 (2003), and other cases treating the bargain in the Berlin Agreements as a judicially enforceable ceiling.

2. Whether private financial promises, using the mandatory "shall," in hybrid documents signed by both private parties and governments are judicially enforceable as contracts or self-executing private economic regulations with "domestic effect" within the meaning of *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

3. Whether respondents' behavior in inducing petitioners to dismiss their cases with prejudice renders respondents' promise judicially enforceable as a matter of promissory estoppel.

PARTIES INVOLVED

Petitioners, ELLY GROSS, ROMAN NEUBERGER, SYLVIA GREENBAUM, JOHN BRAND, BARBARA SCHWARTZ-LEE, and BERNARD LEE[1] are Holocaust survivors residing in the United States who dismissed their legal claims for compensation with prejudice in reliance upon the financial promise at issue herein.

Respondents, ALLIANZ AG; BASF AG; BAYER AG; BMW AG; COMMERZBANK AG; DAIMLER-CHRYSLER AG; DEUTZ AG; DEUTSCHE BANK AG; DRESDNER BANK AG; DEGUSSA-HUELS AG; RAG AG; ROBERT BOSCH GMBH; SIEMENS AG; FRIED. KRUPP AG HOESCH-KRUPP; HOECHST AG; VEBA AG; and VOLKSWAGEN AG are the 17 German corporations that constitute and control THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, a consortium of German companies that negotiated the dismissal of Holocaust-related claims against German industry in return for the financial promise at issue herein.

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[1] Petitioners Barbara Schwartz-Lee and Bernard Lee were appellants below in 07-3727, which was consolidated and decided simultaneously with the *Gross* appeal in 07-3726. Pursuant to Rule 12.4, all petitioners join in a single petition for certiorari.

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Petitioners, ELLY GROSS, ROMAN NEUBERGER, SYLVIA GREENBAUM, JOHN BRAND, BARBARA SCHWARTZ-LEE, and BERNARD LEE, respectfully petition the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered on December 10, 2008, holding that respondents' financial promise to Holocaust survivors in the Berlin Agreements is judicially unenforceable.

CITATIONS OF RELEVANT OPINIONS

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 549 F.3d 605 (3d Cir. 2008). The district court opinion (Pet. App. 34c-222c) is reported at 499 F. Supp. 2d 606 (D.N.J. 2007).[1]

[1] Earlier reported opinions in this litigation include *Gross v. German Found. Indust. Initiative*, 456 F.3d 363 (3d Cir. 2006) (rejecting political question, Act of State, and international comity defenses), *rev'g Gross (In re Nazi Era Cases Against German Defs. Litig.)*, 320 F. Supp. 2d 235 (D.N.J. 2004); *In re Nazi Era Cases Against German Defs. Litig.*, 213 F. Supp. 2d 439 (D.N.J. 2002) (declining to exercise ancillary jurisdiction to construe the settlement agreement); *Duveen v. U.S. Dist. Ct. (In re Austrian & German Holocaust Litig.)*, 250 F.3d 156 (2d Cir. 2001) (mandating dismissal of Nazi-era cases in return for the financial promises at issue herein); *In re Austrian & German Holocaust Litig.*, No. 98-3938, 2001 WL 36176876 (S.D.N.Y. Mar. 20, 2001) (Kram, J.) (recognizing respondents' formal promise to satisfy its financial obligations); *Winters v. Assicurazioni Generali S.p.A., Consol.*, No. 98-9186, 2000 WL 1858482, at *1 (S.D.N.Y. Dec. 18, 2000) (Mukasey, J.) ("[a]s applied to this case,

(Continued on following page)

JURISDICTIONAL STATEMENT

The judgment of the court of appeals (Pet. App. 31b-33b) was entered on December 10, 2008. This consolidated petition is filed, pursuant to Rule 12(4), in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER OFFICIAL DOCUMENTARY PROVISIONS INVOLVED

This case arises out of three interrelated documents known as the "Berlin Agreements," signed in Berlin on July 17, 2000:

(1) *The Joint Statement*, Pet. App. 224d-31d,[2] pursuant to which Holocaust survivors dismissed Nazi-era litigation against German corporate defendants with prejudice, in return for respondents' promise to pay DM 5 billion, plus *at least* DM 100

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the Berlin Agreements constitute, collectively, a settlement agreement"); and *In re Nazi Era Cases Against German Defs. Litig.*, 198 F.R.D. 429, 437, 446-47 (D.N.J. 2000) (recognizing respondents' promise to pay "appropriate interest").

[2] The document's formal title is "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Remembrance, Responsibility and the Future.'" The signature pages and various annexes are omitted from the Pet. App., but are available in the Joint Appendix below ("J.A.") at 238-88.

million in *interest*, to the German Foundation "Remembrance, Responsibility and the Future;"[3]

(2) *An Executive Agreement between Germany and the United States* ("the Executive Agreement"), Pet. App. 224d-54d,[4] committing the Executive branch to defend the financial settlement in the Joint Statement by seeking dismissal of future Nazi-era litigation against German corporate defendants; and

(3) *The German Foundation Law* ("the Foundation Law"), J.A. 289-97, establishing the German Foundation "Remembrance, Responsibility and the Future" ("the German Foundation") as a vehicle for distributing settlement funds in accordance with the Joint Statement.[5]

Paragraph 4(a) and Sentences 1 and 7 of ¶4(d) of the Joint Statement, Pet. App. 228d-29d, the provisions at issue in this litigation, provide:

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[3] The German government, as successor to defunct business operated by the Nazi Party and the SS, also agreed to pay DM 5 billion to the German Foundation. On the date the Berlin Agreements were signed, two DM equaled approximately $1.

[4] See *United States-Germany: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future,"* 39 Int'l Legal Materials 1298 (2000).

[5] The Foundation Law was enacted by the German parliament on August 12, 2000.

¶4(a):

> The Government of the Federal Republic of Germany ("Germany") and the German companies shall each contribute DM 5 billion to the Foundation "Remembrance, Responsibility and the Future."

¶4(d) (Sentence 1):

> . . . the DM 5 billion contribution of German companies shall be due and payable to the Foundation and payments from the Foundation shall begin once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts . . . are finally dismissed with prejudice by the courts.

¶4(d) (Sentence 7):

> . . . . German company funds will continue to be collected on a schedule and in a manner that will ensure that the *interest* earned thereon before and after their delivery to the Foundation will reach *at least* 100 million DM (emphasis added).

STATEMENT OF THE CASE[6]

1. The Negotiation of the Berlin Agreements

In March 1996, the German Federal Constitutional Court lifted a 43 year ban on efforts by Holocaust survivors to obtain legal redress against German industry. *Krakauer v. F.R.G.*, Fed. Constitutional Ct. BvL 33/93 (Mar. 13, 1996). Following *Krakauer*, more than 60 cases arising out of the Nazi era were filed against German corporate defendants in United States courts, many alleging the use of slave labor under horrific conditions. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 403-05 (2003); J.A. 838.

In September 1998, respondents approached then-Assistant Secretary of State Stuart E. Eizenstat seeking dismissal of the burgeoning Nazi-era litigation through legislation or an Executive Agreement superseding the victims' legal rights. Secretary Eizenstat rejected such an extra-legal approach to resolving the pending litigation. Instead, he agreed to foster private settlement negotiations between and among the respondents (representing German industry), the German government (representing defunct businesses operated by the SS and the Nazi Party), and the principal lawyers for the victims, in an effort

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[6] Subject matter jurisdiction was invoked in the lower courts under 28 U.S.C. § 1332(a)(2) (alienage), and 28 U.S.C. § 1331 (federal question).

to reach a private settlement that would provide "legal peace" for German industry at a "fair price."[7]

In February 1999, the parties commenced face-to-face negotiations in Washington, D.C. The negotiators immediately confronted a procedural impasse. Since respondents refused to consider a Fed. R. Civ. P. 23 class action settlement, the victims were unable to offer protection against future litigation. Without such protection, respondents refused to consider settling the pending litigation. *Imperfect Justice* at 221-22, 257.

To break the impasse, Secretary Eizenstat promised that if a "fair price" could be negotiated, the United States would enter into an Executive Agreement with Germany protecting the bargain against future litigation arising out of the Nazi era. But Secretary Eizenstat refused to supersede the victims' legal rights. Instead, he agreed to commit the Executive branch to file Statements of Interest in future cases arising out of the Nazi era urging, but not compelling, Article III courts to treat a fair settlement as final. *Id.* at 221-22, 257-58; J.A. 840-44, 1224.

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[7] Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* (Public Affairs 2004) 213-22; J.A. 839-40. Secretary Eizenstat has sworn to the accuracy of Chapters 10-13 of *Imperfect Justice*, which describes the negotiations leading to ¶4. Pet. App. 255e-57e. The lower courts treated the narrative as part of the record.

The parties then negotiated a "fair price," which is set forth in ¶4 of the Joint Statement.[8] Paragraph 4(a) obligates respondents and the German government to each pay DM 5 billion to the German Foundation "Remembrance, Responsibility and Future," for distribution to Nazi-era victims in accordance with the formula in the Joint Statement. In return, ¶4(g) commits the victims to dismiss all pending Nazi-era litigation with prejudice. Paragraphs 4(b) and 4(h) commit the United States to ratify an Executive Agreement protecting the bargain against future litigation arising out of the Nazi era. Paragraph 4(c) commits six nations with large victim populations to endorse the settlement.[9]

Since the actions described in ¶¶4(b), (c), (g), and (h) could not be performed overnight, respondents demanded iron-clad security. Sentence 1 of ¶4(d) defers respondents' duty to transfer any portion of its DM 5 billion principal obligation to the German Foundation until all Nazi-era cases had been dismissed with prejudice ("Sentence 1 deferral period"). The parties assumed that such a deferral period would last approximately six months.[10]

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[8] Pet. App. 224d-31d. The most relevant provisions are quoted *supra* at 4.

[9] The six nations are Israel, Poland, the Czech Republic, Russia, Ukraine and Belarus. J.A. 858, 1221.

[10] See, *e.g.*, J.A. 943 (Decl. of Count Lambsdorff, leader of the German delegation, Mar. 9, 2007) (discussing his April 19, 2000 letter to Stuart Eizenstat which stated that he anticipated

(Continued on following page)

Unlike respondents, the German government agreed in Sentences 2, 3 and 4 of ¶4(d) to expedite its payments to the German Foundation prior to the dismissal of the American cases in order to permit the funds to earn interest for the victims as quickly as possible.[11] Stuart E. Eizenstat, former Deputy Secretary of the Treasury and the principal draftsman of the Joint Statement, attests that Sentence 7 of ¶4(d), the provision at issue in this litigation, was designed to assure a parallel accrual of interest on respondents' DM 5 billion principal obligation during the Sentence 1 deferral period. See Pet. App. 255e-57e (Eizenstat Decl.).

2. The 18 Month Delay in Satisfying Respondents' Financial Obligations

Unexpectedly, the Sentence 1 deferral period lasted 18 months. Respondents experienced unanticipated difficulty raising funds. J.A. 867-68. Moreover, on January 24, 2001, a federal judge erroneously

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the dismissal of the American cases "well before the end of the year"); J.A. 889-91 (working paper prepared by Secretary Eizenstat's staff in August 1999 using the same six month assumption).

[11] Sentences 2, 3 and 4 of ¶4(d) describe the German government's payment schedule. Sentence 4 provides:

> Contributions from the German government will begin earning interest for the benefit of the Foundation immediately upon being made available to the Foundation.

Pet. App. 229d.

refused to dismiss the final Nazi-era cases, necessitating the issuance of a writ of mandamus by the Second Circuit on May 17, 2001. *Duveen v. U.S. Dist. Ct.* (*In re Austrian & German Holocaust Litig.*), 250 F.3d 156 (2d Cir. 2001). On June 20, 2001, eleven months after the signing of the Joint Agreement, respondents finally transferred DM 3.4 billion to the German Foundation, and promised to pay the balance as soon as the funds could be raised. J.A. 867-69. An additional DM 1.7 billion was transferred in installments over the next six months, culminating in a final payment of DM 100 million in December 2001 – 18 months after the signing of the Joint Statement. *Id.*

Petitioners believe that respondents' final DM 100 million payment was a partial payment of respondents' interest obligation under Sentence 7 of ¶4(d), leaving a substantial balance that now exceeds DM 250 million. Respondents disclaim any interest obligation at all, insisting that the final DM 100 million payment was an addition to principal.[12]

In November 2001, counsel offered to submit the dispute to arbitration. Respondents refused. J.A. 870. In February 2002, counsel offered to submit the dispute to the Board of Trustees of the German Foundation. Respondents refused. *Id.* at 394. In July 2002, despite the strong views of Secretary Eizenstat (who had returned to private life), the United States

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[12] See discussion *infra* Point III for a summary of the parties' respective positions on the merits.

declined to take a position on the meaning of ¶4(d), rendering a diplomatic resolution impossible. See Pet. App. 258f-59f (Letter from the Justice Dep't to Judge Bassler (July 22, 2002)).

3. The Procedural History of This Litigation

In 2002, counsel sought a speedy resolution by asking the supervising district judge to construe the settlement agreement at the heart of the Berlin Agreements. The district court disclaimed ancillary jurisdiction over the settlement agreement, necessitating the filing of a plenary enforcement action. *In re Nazi Era Cases*, 213 F. Supp. 2d 439 (D.N.J. 2002). In 2004, after the filing of a plenary enforcement action, the district court dismissed the plenary complaint under the political question doctrine. *Gross*, 320 F. Supp. 2d 235 (D.N.J. 2004). In 2007, the district court, having been reversed by the Third Circuit on the political question issue, 456 F.3d 363, dismissed the complaint yet again under Fed. R. Civ. P. 12(b)(6), this time ruling that respondents' financial promise is judicially unenforceable. Pet. App. 160c-72c.[13] In December 2008, a new Third Circuit panel affirmed

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[13] The district court, acting *sua sponte*, also granted summary judgment under Fed. R. Civ. P. 56 on the meaning of ¶4(d). Pet. App. 172c-213c. The Third Circuit decision below did not discuss the meaning of ¶4(d), or the propriety of the district court's clearly erroneous *sua sponte* summary judgment procedure. Accordingly, neither issue is before the Court. See *infra* Point III.

on the sole ground that respondents' financial promise in the Berlin Agreements is not judicially enforceable. Pet. App. 1a-31a.

4. The Opinion Below

The opinion below, granting respondents' motion to dismiss under Fed. R. Civ. P. 12(b)(6), rests on four questionable premises. First, the lower court treated the Joint Statement as a "diplomatic document" in its entirety, including respondents' private financial promise to the victims. Pet. App. 12a-14a.

Second, the court reasoned that, under the law of foreign relations, commitments in diplomatic documents – even financial promises between private parties – are judicially unenforceable in the absence of a showing that the parties intended to make them judicially enforceable. *Id.* at 23a-24a.

Third, the court claimed that the prospect of diplomatic enforcement of the Berlin Agreements provided Holocaust victims with adequate protection, rendering judicial enforcement unnecessary. *Id.* at 19a-20a.

Finally, the court relied heavily on the absence of an explicit enforceability provision, and on the fact that the document is called a "Joint Statement," whose signatories are called "participants" who "declare" the document's terms. *Id.* at 16a-17a, 22a-24a.

With respect, all four premises are wrong.

1. The private financial bargain in the Joint Statement has nothing to do with the law of foreign relations. It is a classic, judicially enforceable unilateral contract. See *infra* Point II.A.

2. Even if viewed from an international law perspective, respondents' financial promise is a discrete, self-executing private economic regulation which has "domestic effect" under the Chief Justice's analysis of judicial enforceability in *Medellin v. Texas*, 128 S. Ct. 1346 (2008). See *infra* Point II.B.

3. This case demonstrates that the lower court was wrong when it claimed that Holocaust victims did not need judicial protection because they could safely rely on diplomatic enforcement of the Berlin Agreements in full. The diplomatic community subordinated the legal rights of slave laborers to West German economic recovery in the London Debt Agreement, *Garamendi*, 539 U.S. at 403-04; and, according to Judge Debevoise, to German reunification in the 2+4 Treaty. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999). During the negotiations leading to the Joint Statement, diplomats suppressed a Justice Department brief *amicus curiae* destined for the Third Circuit arguing that Judge Debevoise was wrong in ruling that the 2+4 Treaty extinguished the legal rights of Holocaust victims. *Imperfect Justice* at 245-46; 270-74. And, in this very case, diplomats have disclaimed knowledge of the meaning of ¶4(d), despite Secretary Eizenstat's

strongly held views. Compare Pet. App. 255e-57e (Eizenstat Decl.), with *id.* at 258f-59f (Justice Dep't Ltr.).

Judge Walter Stapleton was correct when he wryly noted during oral argument in an earlier phase of this litigation that counsel would have been "temporarily insane" to dismiss their clients' legal claims with prejudice in the absence of a judicially enforceable means of assuring full compliance with respondents' financial *quid pro quo*.[14]

4. The lower court's textual analysis was deeply flawed. The court disregarded the textual signal sent by the differential use of "will" to introduce unenforceable commitments, and "shall" to introduce respondents' judicially enforceable financial obligations. See *infra* Point II.A.

Instead, despite *Medellin*, 128 S. Ct. 1346, the lower court relied heavily on the lack of express language providing for judicial enforceability, and drew unsupported inferences from the document's title as a "Joint Statement." The lower court overlooked the fact that the use of stylized terms like "Joint Statement," "participant" and "declare" was a necessary consequence of relying on a single hybrid

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[14] Counsel for the victims have sworn that they would never have moved to dismiss their clients' valuable legal claims with prejudice if they had believed respondents' promises to be judicially unenforceable. J.A. 857-60.

document to convey both private and governmental promises.

5. Although the issues were fully briefed and argued below, the lower court failed to discuss the precedential effect of *Garamendi*, 539 U.S. 396, and did not address whether respondents' behavior in inducing petitioners to dismiss their Nazi-era cases with prejudice renders the financial promise judicially enforceable as a matter of promissory estoppel and prevention of unjust enrichment. See *infra* Points I & II.C.

REASONS FOR GRANTING THE WRIT

The Berlin Agreements and the Rule of Law

This Court has already recognized the importance of the Berlin Agreements. *Garamendi*, 539 F.3d 396. For German industry, the Berlin Agreements close a difficult historical chapter with "legal peace." For the affected nations, the Berlin Agreements remove a diplomatic irritant. Most importantly, for surviving slave laborers and other victims of corporate wrongdoing during the Nazi era, the Berlin Agreements are a long-overdue affirmation of their status as equals under the rule of law.

The significance of the Berlin Agreements to Holocaust victims cannot be measured solely, or even

primarily, in material terms. Receipt of DM 15,000[15] by a surviving slave laborer for years of horrific toil in a Nazi concentration camp, paid 50 years after the event, while welcome, is hardly cause for celebration. The true healing power of the Berlin Agreements flows from the restoration of human dignity inherent in recognizing Holocaust victims as equals, and the psychological closure such recognition makes possible.

The *Krakauer* court perceived the importance of the rule of law to achieving dignified closure for Holocaust victims. Secretary Eizenstat similarly understood the healing power of the rule of law when he rejected a "political" solution to the Nazi-era litigation, insisting instead that German industry negotiate directly with Holocaust victims as equals. Unfortunately, the court below appears to have misunderstood the centrality of the rule of law to the Berlin Agreements. It would be one thing to find, after a fair hearing,[16] that the victims' reading of ¶4 is incorrect. That would be the rule of law in action. It is quite another to hold that the Berlin Agreements ousted Holocaust victims from the right to claim

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[15] The negotiated compensation formula sets DM 15,000 as the target payment for "slave laborers." Pet. App. 240d.

[16] Petitioners have never had a fair hearing. The flaws inherent in the *sua sponte* summary judgment procedure used in the district court are discussed *infra* Point III. The lower court did not reach the issue.

equal justice under law, relegating them, yet again, to the status of diplomatic supplicants.

1. The Decision Below Is Contrary to *Garamendi*, 539 U.S. 396 (2003), and Other Cases That Have Enforced the Berlin Agreements

The Court should grant certiorari in accordance with Rule 10(c) to preserve the integrity and even-handed application of important precedent. The decision below, declining to permit petitioners to enforce the financial bargain in the Berlin Agreements as a floor, cannot be squared with this Court's ruling in *Garamendi*, which treated the bargain as a judicially enforceable ceiling, or with other cases that have similarly enforced the Berlin Agreements against the victims at respondents' behest. The *Garamendi* Court could not have intended to create an unfair one-way street where the Berlin Agreements are judicially enforceable against Holocaust victims as a ceiling, but are judicially unenforceable by the victims as a floor. See *supra* Point I.

2. The Legal Status of Respondents' Financial Promise Poses an Important Question of First Impression

Entirely apart from the adverse impact of the lower court decision on the Berlin Agreements, this Court should grant certiorari pursuant to Rule 10(c) to resolve an important question of first impression -- the legal status of private financial promises in

hybrid documents like the Joint Statement, signed by both private parties and governments. Whether private financial promises contained in a hybrid document like the Joint Statement are contracts or diplomatic representations is an important question of first impression.

Petitioners believe that the law of contract, with its strong presumption of judicial enforceability, is the most appropriate legal framework for analyzing such private financial promises. The lower court assumed that since all commitments in such hybrid documents – including financial promises between private parties – are inherently diplomatic in nature, they are judicially unenforceable in the absence of a showing to the contrary. Resolution of the disagreement by the Court is particularly important in view of the crucial role played by emerging forms of hybrid public/private cooperation in confronting problems of international scope. See *supra* Point II.

3. Respondents' Financial Promise Is Judicially Enforceable as a Matter of Promissory Estoppel and the Prevention of Unjust Enrichment

Respondents knowingly used the financial promise in ¶4 of the Joint Statement to induce petitioners to dismiss valuable legal claims with prejudice. But respondents' inducements did not stop with petitioners. Respondents also persuaded three federal judges to dismiss more than 60 Nazi-era cases with prejudice

by promising to abide fully with the financial commitments in the Joint Statement. While a grant of certiorari is fully warranted solely on the basis of respondents' financial promise to the victims, review by this Court is doubly necessary under Rule 10(a) to defend the integrity of the judicial process. See *supra* Point II.C.

I.

THE DECISION BELOW IS CONTRARY TO *GARAMENDI*, 539 U.S. 396 (2003), AND OTHER CASES THAT HAVE ENFORCED THE BERLIN AGREEMENTS

In *Garamendi*, 539 U.S. 396 (2003), European insurance companies challenged a California statute requiring public disclosure of unpaid Holocaust-era insurance policies. This Court ruled that, despite the lack of an express preemption clause, the Berlin Agreements preempted legislative efforts by state or local governments to require benefits exceeding or otherwise conflicting with the terms of the Berlin Agreements. *Id.* at 413-27.

In *Garamendi*, this Court gave great weight to the United States' view that California's statute was in clear conflict with the Berlin Agreements. *Id.* at 421, 424-25. In its brief *amicus curiae* in *Garamendi*, the United States made its interest clear:

> . . . United States policy disfavors the imposition of *further* obligations on companies subject to the agreements, whether through

> regulation or litigation, *beyond those contemplated by the agreements themselves.*[17]

Unlike *Garamendi*, petitioners do not seek to alter the Berlin Agreements. They seek to enforce them, just as this Court enforced them in *Garamendi*.

Similarly, in *Frumkin v. J.A. Jones, Inc.* (*In re Nazi Era Cases Against German Defendants Litigation*), 129 F. Supp. 2d 370 (D.N.J. 2001), when Holocaust victims sued for compensation in excess of the amounts provided for by the Joint Statement, German industry successfully invoked the financial bargain in the Berlin Agreements as a judicially enforceable ceiling.[18]

Having persuaded this Court in *Garamendi*, and the district courts in *Frumkin* and *Winters*, that the financial bargain in the Berlin Agreements is judicially enforceable as a ceiling, respondents may not oppose judicial enforceability of the identical bargain as a floor. Viewed as a matter of *stare decisis* under *Garamendi*, or judicial estoppel under *New Hampshire v. Maine*, 532 U.S. 742 (2001), the judicially enforceable nature of the private financial bargain at

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[17] Brief for United States as *Amicus Curiae* Supporting Petitioners (Nos. 02-722, 02-733) (emphasis added).

[18] In *Winters*, 2000 WL 1858482, at *1, Judge Mukasey noted that "[a]s applied to this case, the Berlin Agreements constitute, collectively, a settlement agreement." At the insistence of respondents, he then construed the meaning of "German companies" in the Executive Agreement and Joint Statement. *Id.* at *1-*3.

the heart of the Berlin Agreements has been definitively established.

Respondents insist that *Garamendi* and *Frumkin* involved judicial enforcement of the Executive Agreement, not the Joint Statement. According to respondents, the Berlin Agreements are made up of three freestanding documents existing in splendid isolation from one another. But the record proves otherwise.

If respondents had been willing to enter into a preclusive class action settlement, the Executive Agreement would have been unnecessary. Indeed, the Executive Agreement has only one function – to provide respondents with a functional substitute for common law preclusion in order to protect the financial bargain in the Joint Statement from collateral attack. The doctrine of preclusion is designed to protect and enforce an earlier judgment on the merits. *Rivet v. Regions Bank*, 522 U.S. 470, 476-77 (1998). Thus, judicial enforcement of the preclusive effect of the Executive Agreement is nothing more or less than judicial enforcement of the Joint Statement itself.

As Judge Bassler noted in describing the Executive Agreement:

> Rather than extinguishing the legal claims of its nationals or anyone else, the United States merely *helped facilitate an agreement*

between victims, German Industry, and the German government.[19]

Since the Executive Agreement is merely a device to "facilitate" the bargain in the Joint Statement, judicial decisions like *Garamendi* and *Frumkin* invoking the Executive Agreement to enforce the bargain in the Joint Statement as a ceiling inevitably support a correlative right to enforce the bargain as a floor.

II.

THE FINANCIAL BARGAIN IN THE BERLIN AGREEMENTS IS JUDICIALLY ENFORCEABLE

A. Respondents' Financial Promise Constitutes a Judicially Enforceable Unilateral Contract

A fair reading of the text of the Joint Statement demonstrates the parties' intent to render respondents' financial promise judicially enforceable as a unilateral contract identical to the famous Brooklyn Bridge hypothetical.[20]

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[19] See *In re Nazi Era Cases*, 198 F.R.D. at 435 (emphasis added). The term "agreement" refers to the bargain in the Joint Statement.

[20] See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (promise of permanent employment to replacement workers during strike gives rise to unilateral contract claim); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) (promise by United States inducing

(Continued on following page)

In a unilateral contract, one party commits to the performance of a judicially enforceable legal obligation, but only if the other party performs specified predicate tasks. See generally Mark Pettit, *Modern Unilateral Contracts*, 63 B.U. L. Rev. 551 (1983). The text of the Joint Statement takes the form of a classic unilateral contract. The parties carefully distinguished between respondents' legally binding financial promise, and the other signatories' predicate tasks by using "shall" to describe respondents' unilateral promise, and "will" to describe the predicate tasks. Thus, on 13 occasions, the word "will" introduces a predicate task that is not amenable to judicial enforcement, either because it is voluntary, or because it involves the performance of a sovereign act.[21]

Indian tribe to provide services constitutes enforceable contract); see also *Mobil Oil Exploration and Producing Se., Inc. v. United States*, 530 U.S. 604 (2000).

[21] The word "will" is used in ¶2 ("participants *will* work together" fairly); ¶3 (Foundation *will* respect Foundation Law, and "*will* act justly"); ¶4 ("Governments and other participants *will* proceed as follows"); ¶4(b) (U.S. and Germany "*will* sign an Executive Agreement"); ¶4(c) (six nations with large victim populations "*will*" take necessary steps to support the settlement); ¶4(d) Sentence 6 ("German companies *will* make available" advance funding for notice costs); ¶4(f) ("Germany *will* immediately establish a preparatory committee," and "*will* provide the publicity" and prepare for victims' applications); ¶4(g) (counsel for victims "*will* file motions" to dismiss with prejudice, and "*will* also cooperate" in dismissing other cases); ¶4(h) (Germany and U.S. *will* ratify the Executive Agreement, and the U.S. *will* file Statements of Interest in future Nazi-era cases); and ¶4(i) ("German government *will* encourage" opening of corporate archives). Pet. App. 227-31 (emphasis added).

On three occasions, however, the document shifts dramatically to "shall" to describe respondents' financial obligation once the predicate tasks have been performed. See *supra* at 4 (Germany[22] and "the German companies *shall* . . . contribute DM 5 billion"; payments "of German companies *shall* be due and payable"; payments from the German companies "*shall* begin once all lawsuits . . . are finally dismissed") (emphasis added).

The shift from "will" to "shall" was not random. The term "shall" is widely understood as describing a judicially enforceable obligation. See *Medellin*, 128 S. Ct. at 1358 (noting that an international agreement using the word "shall" has "legal effect in domestic courts"); *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (noting that "shall" is "rights-creating" language); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 693 & n.13 (1979) (same) (collecting cases). Moreover, Ronald J. Bettauer, the ranking State Department negotiator on Secretary Eizenstat's staff, has made it clear that the differential use of "will" and "shall" was not inadvertent:

> We . . . developed a document [the Joint Statement] that set forth political rather then legal commitments – that is undertakings that various participants "*will*" take

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[22] The word "shall" is used with respect to Germany's obligation to pay DM 5 billion to reflect both a partial waiver of sovereign immunity and that Germany was representing defunct Nazi-era businesses.

various steps, rather than *legal commitments* that they "s*hall*" do so.[23]

Taking Mr. Bettauer at his word, the use of "shall" to describe respondents' financial promise, and "will" to describe everything else demonstrates a considered textual judgment to treat respondents' financial promise as a judicially enforceable *legal commitment* under the law of unilateral contract.

Respondents argue that the reversion to "will" in Sentence 7 of ¶4(d) to describe the actual accrual of interest during the Section 1 deferral period strips the shall/will dichotomy of meaning. But respondents ignore the grammatical basis for the shift, which reflects the change from declarative usage connoting a duty in ¶4(a) and Sentence 1 of ¶4(d) ("German companies *shall* each contribute"; payments "*shall* be due"; payments "*shall* begin"), to descriptive usage involving an inanimate subject in Sentence 7 (funds "*will*" be collected; interest "*will* reach"). See *supra* at 4.[24]

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[23] Ronald J. Bettauer, *Keynote Address: The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 Berkeley J. Int'l L., 1, 9 (2000) (emphasis added).

[24] The identical grammatical shift takes place in Sentences 2, 3 and 4 of ¶4(d) with respect to the early payment and accrual of interest on the German government funds (initial part of Germany's contribution "*will* be made available" by October 31, 2000 and the remainder "*will* be made available" by December 31, 2000; Germany's fund "*will* begin earning interest" immediately upon expedited payment). Pet. App. 227d-31d (emphasis added).

The differential use of "shall" and "will" in ¶4 is far stronger textual evidence than the lower court's reliance on terms like "Joint Statement," "participant" and "declare" to support an inference that the parties did not contemplate judicial enforcement. Use of such stylized terms in a hybrid document proves nothing. Such terminology merely reflects an attempt to utilize language compatible with both private and governmental promises. A "participant" in a "Joint Statement" may "declare" legally binding duties. At the same time, terms like "Joint Statement," "participant," and "declare" allow the governments to avoid implying that their promises are judicially enforceable.

Finally, the court below reasoned that the numerous expressions in the Berlin Agreements of a desire to achieve "legal peace" implied a decision to render respondents' financial promise judicially unenforceable. Pet. App. 16a. But the lower court confused a desire to reach an amicable financial settlement of litigation arising out of the Nazi-era, with a decision to render respondents' financial promise judicially unenforceable. A desire to enter into a settlement on the merits in no way implies a willingness to render the settlement judicially unenforceable. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378, 380 (1994) (distinguishing claims arising out of the merits from claims arising out of a settlement agreement).

An earlier panel of the Third Circuit in this case understood and articulated the distinction between a

claim arising out of the Nazi era, and a claim arising out of respondents' promise to fund the German Foundation as the *quid pro quo* for "legal peace." *Gross*, 456 F.3d at 380-81. The United States understands the distinction, as well. That is why no Statement of Interest seeking dismissal has been filed in this case.

B. Respondents' Financial Promise Is Self-Executing Under *Medellin*, 128 S. Ct. 1346 (2008)

Even if the Joint Statement is treated as a diplomatic document in its entirety, respondents' financial promise is judicially enforceable. Where, as here, discrete provisions of an alleged "international diplomatic document" regulate economic relations between private parties, 200 years of Supreme Court precedent recognize that such provisions are judicially enforceable in the absence of explicit language concerning judicial enforceability.[25] Indeed, when the

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[25] See, *e.g.*, *Ware v. Hylton*, 3 Dall. 199 (1796) (debtor/creditor relations); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 356-57 (1816) (land ownership); *De Geofoy v. Riggs*, 133 U.S. 258, 267, 273 (1890) (inheritance); *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 273-74 (1909) (travel, trade, access to courts); *Asakura v. Seattle*, 265 U.S. 332, 340-44 (1924) (trade and commerce); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 160-61, & n.9 (1940) (trademark); *Clark v. Allen*, 331 U.S. 503, 507-08, 517-18 (1947) (inheritance); *Kolovrat v. Oregon*, 366 U.S. 187, 191-93, n.6, 198 (1961) (property rights and inheritance); *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (air carrier liability); *Sumimoto Shoji Am., Inc. v. Avagliano*, 457

(Continued on following page)

Chief Justice referred to self-executing treaties with "domestic effect" in *Medellin*, 128 S. Ct. at 1363-64 & n.2, he was describing documents like the Joint Statement. It is hard to imagine an international document with more "domestic effect" than an agreement between private parties to dismiss more than 60 Nazi-era cases pending in United States courts, in return for a defined financial *quid pro quo*, much of which is payable to American citizens.

C. Respondents' Financial Promise Is Judicially Enforceable as a Matter of Promissory Estoppel and Prevention of Unjust Enrichment

In reliance on respondents' repeated promises that they would comply with the financial bargain in ¶¶4(a) and (d):

1. the victims sought leave under Fed. R. Civ. P. 23(e) to dismiss more than 60 pending Nazi-era cases with prejudice;

2. three federal judges dismissed all pending Nazi-era litigation against German corporate defendants with prejudice, after receiving explicit assurances from respondents that the financial bargain in ¶4 would be honored

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U.S. 176, 181, 189-90 (1982) (employment practices); *SNIA v. U.S. Dist. Ct.*, 482 U.S. 522, 524, 533 (1987) (international discovery rules); *Olympic Airways v. Husain*, 540 U.S. 644, 649, 657 (2004) (air carrier liability).

in full, including the payment of "appropriate interest";

3. the United States ratified the Executive Agreement insulating respondents against future erosion of the financial bargain; and

4. several federal courts, including this Court in *Garamendi,* treated the bargain in the Joint Statement as a judicially enforceable ceiling.

When three federal judges expressed doubt about dismissing pending Nazi-era litigation prior to the full funding of the German Foundation, respondents explicitly promised the courts that the financial *quid pro quo* set forth in ¶¶4(a) and (d) would be honored in full if the cases were dismissed with prejudice. J.A. 861-67. The three judges expressly relied on such a promise in agreeing to dismiss the litigation with prejudice. For example, in seeking dismissal of 49 pending Nazi-era cases with prejudice, respondents made the following representation to Judge Bassler:

> The money will be there, your honor. I have absolutely no doubt about it. I believe that with a high degree of confidence. I would not be standing before the Court if I did not have that degree of confidence that the money would be there.

J.A. 862. In his written opinion granting leave to dismiss 49 Nazi-era cases with prejudice, Judge Bassler noted:

> German industry is . . . publicly committed to making its payment of DM 5 billion, ***with appropriate interest***, as soon as the cases still pending in American courts are dismissed.

In re Nazi Era Cases, 198 F.R.D. at 437, 446-47 (emphasis added). No respondent has ever questioned Judge Bassler's statement.

Similar assurances were made to Judges Mukasey and Kram. J.A. 863-67. Indeed, when Judge Kram refused to accept oral assurances of payment, respondents entered into a formal guaranty of payment called a *Burgschaft*. *In re Austrian & German Holocaust Litig.*, 2001 WL 36176876, at *1.

Since respondents knowingly invoked the financial promise in ¶4 to obtain the full benefit of their bargain, respondents are legally bound to honor the written financial inducements set forth in ¶¶4(a) and 4(d). Whether one characterizes the transaction as an option contract under Restatement (Second) of Contracts § 45; a unilateral contract, as does Farnsworth on Contracts § 3.24; an exercise in restitution, as in §§ 812-22 of the German Civil Code; or the enforcement of a promissory estoppel under Restatement (Second) of Contracts § 90, courts uniformly enforce a financial promise by A (the respondents) that knowingly induces detrimental reliance by B (the victims), see *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

Thus, even if one were to find, erroneously, that ¶4(d) of the Joint Statement is not itself enforceable,

and that *Garamendi* is not controlling, respondents' repeated promises to petitioners and to three federal judges, coupled with respondents' receipt of the full benefit of the bargain, gives rise to an independent equitable basis for judicial enforceability rooted in prevention of unjust enrichment, quasi-contract, and promissory estoppel.

III.

THE PARTIES' DISAGREEMENT OVER THE MEANING OF ¶4(d) WARRANTS JUDICIAL RESOLUTION PURSUANT TO THE RULE OF LAW

Since the court below did not address the legality of the district court's erroneous *sua sponte* grant of summary judgment for the defendants,[26] it is unlikely that this Court would wish to consider those issues at this time. Given the district court's opinion, however,

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[26] The *sua sponte* summary judgment procedure adopted by the district court, Pet. App. 172c-213c, was clearly erroneous. It failed to provide the 10 days notice required by the Federal Rules; failed to provide petitioners with an opportunity to react to the Court's misreading of the record; failed to accord any probative weight to Secretary Eizenstat's declaration; failed to respect the plain meaning of the text; and failed to permit the correction of glaring mistakes in interpreting Secretary Eizenstat's narrative in *Imperfect Justice*. See, *e.g.*, Pet. App. 184c-87c, 196c-205c (misreading Secretary Eizenstat's description in *Imperfect Justice* at 254 of the genesis of ¶4(d) in a November 1999 "creative accounting" agreement with respondents).

it is appropriate to inform the Court concerning the parties' respective positions on the merits.

Petitioners, supported by a declaration of Stuart E. Eizenstat, former Deputy Secretary of the Treasury and principal draftsman of the Joint Statement, read Sentence 7 of ¶4(d) as imposing an interest obligation (at the 4% statutory default rate)[27] on respondents' unpaid principal balance during the Sentence 1 deferral period needed to secure dismissal of the pending U.S. cases.

Secretary Eizenstat states:

> [S]entence 7 of paragraph 4(d) of the Joint Statement . . . was intended to establish a *minimum* interest figure payable to the Foundation in connection with the deferral during the period needed to attain "legal peace" of the German Foundation Industrial Initiative's obligation to pay DM 5 billion to the Foundation. The language, which was carefully negotiated, *was not intended to establish an interest ceiling, or to describe an addition to principal.*

Pet. App. 256e-57e (emphasis added).

Respondents disclaim any interest obligation. They read Sentence 7 of ¶4(d) as guaranteeing merely

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[27] Section 246 of the German Civil Code provides: "If interest on a debt is payable by virtue of a statute or in connection with a legal transaction, the interest rate is 4% per year, unless otherwise provided."

that respondents' DM 5 billion would, in fact, generate DM 100 million in interest over the multi-year life of the German Foundation, to be added to principal when earned. J.A. 969-72 (Gentz Decl.); *id.* at 942-44 (Lambsdorff Decl.).

The text is complex because ¶4(d) was designed to achieve two purposes. Most importantly, ¶4(d) provides for interest (at the 4% statutory default rate) during the Sentence 1 deferral period,[28] which the parties assumed would last six months. See *supra* n.10. It was no coincidence, therefore, that 4% interest on DM 5 billion for six months equals the DM 100 million figure recited in the text.

But the text also fulfilled a second important task by assuring that DM 100 million in interest would be earned on respondents' DM 5 billion principal obligation no matter how *short* the Sentence 1 deferral period might be. An absolute guaranty of DM 100 million was necessary to permit the Foundation Law, enacted before the interest was earned, to allocate an additional DM 100 million to break a negotiating impasse.

To account for the very real possibility that the Sentence 1 deferral period would last less than six

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[28] See *Imperfect Justice* at 254 (tracing the interest aspects of ¶4(d) to a November 1999 "creative accounting" agreement with respondents, which provided that interest would be earned on the funds while the parties waited for the U.S. cases to be dismissed).

months (resulting in an actual accrual at 4% of less than DM 100 million in interest), the text provides that the guaranteed DM 100 million may be earned "before and after" the deposit of DM 5 billion into the Foundation during the remaining portion of the six month period. Conversely, to account for the possibility that the Sentence 1 deferral period might last more than six months, "at least" assures the continued accrual of interest at 4% throughout the deferral period.[29]

Respondents' insistence that ¶4(d) has nothing to do with interest cannot be squared with the text. Respondents read "interest" as "principal," "at least" as "at most," and "before and after" as nothing at all. Respondents' contemporaneous behavior is inconsistent with their reading of the text. Respondents made their last payment of DM 100 million to the Foundation in December 2001, at a point when their DM 5 billion had already earned DM 75 million in interest after transfer to the Foundation.[30] If the text provides, as respondents contend, that respondents' obligation was capped at DM 100 million, respondents' final

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[29] If only DM 100 million was owed, as respondents contend, respondents' DM 5 billion would have earned only 1% interest for the victims during the 18 month delay in payment, providing respondents with a substantial windfall, since they were earning at least 4% on the funds during the deferral period.

[30] Respondents' funds had been earning interest at the then German "going rate" of 4% since the initial payment of DM 3.4 billion to the German Foundation on June 20, 2001. See *supra* at 9.

payment should have been DM 25 million, or nothing at all, since the remaining DM 25 million would have been earned within the next few months.

Petitioners are confident that a fair resolution of this dispute will result in recovery of substantial additional interest. Whatever the outcome on the merits, however, petitioners are entitled to a dignified resolution of this dispute as equals seeking justice under law; not as supplicants subject to the trump of diplomatic expediency.[31]

CONCLUSION

For the above-cited reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit below.

Dated: March 2, 2009
New York, New York

Respectfully submitted,

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[31] Given the participation of the United States as *amicus curiae* in *Garamendi*, petitioners respectfully suggest the propriety of seeking the views of the United States in connection with the consideration of this petition.

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APPENDIX

APPENDIX A

CIRCUIT COURT OPINION BELOW

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-3726 & 07-3727

ELLY GROSS; ROMAN NEUBERGER; JOHN BRAND, in their individual capacities as third-party beneficiaries of the agreements leading to the establishment of the German Foundation "Remembrance, Responsibility and the Future", as representatives of all German Foundation beneficiaries; SYLVIA GREENBAUM,

Appellants in 07-3726

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, and its constituent managing companies; ALLIANZ AG; BASF AG; BAYER AG; BMW AG; COMMERZBANK AG; DAIMLER-CHRYSLER AG; DEUTSCHE BANK AG; DEGUSSA-HUELLS AG; DEUTZ AG; DRESDNER BANK AG; FRIEDR KRUPP AG HOESCH KRUPP; HOECHST AG; RAG AG; ROBERT BOSCH GMBH, SIEMENS AG; VEBA AG; VOLKSWAGEN AG, sued individually; and as members of the German Foundation Industrial Initiative

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App. 2

BARBARA SCHWARTZ LEE; BERNARD LEE,

Appellants in 07-3727

v.

DEUTSCHE BANK, AG; DRESDNER BANK, AG

On Appeal from the United States District Court
for the District of New Jersey
(Civ. Action Nos. 02-cv-02936 and 03-cv-03181)
District Judge: Honorable Dickinson R. Debevoise

Argued October 29, 2008

Before: McKEE, NYGAARD, and
MICHEL,* *Circuit Judges.*

(Opinion Filed: December 10, 2008)

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* The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION OF THE COURT

MICHEL, *Chief Circuit Judge.*

At issue in this World War II reparations case is whether the Joint Statement of the Berlin Accords constitutes a privately enforceable contract between some of the participants to the Joint Statement. Appellants contend that the defendant German companies owe "interest" on their payments to a reparations fund created by the Berlin Accords. In a prior appeal to our court, we held that the claim presented a justiciable issue not foreclosed by the political question doctrine. Having again considered the allegations of the complaints, we hold that the disputed interest provision of the Joint Statement does not constitute or confer a privately enforceable

cause of action on the Appellants, who assert standing as third-party beneficiaries. In so holding, we note the thoroughness of the district court's analysis and reasoning. Because we agree with Judge Debevoise's rationale, we adopt it as ours, with some minor points as described herein.

I. Background

Because the history and facts of this case are set forth in ample detail in our previous opinion, *Gross v. German Foundation Industrial Initiative,* 456 F.3d 363 (3d Cir. 2006) ("*Gross II*"), and the two district court opinions, *Gross v. German Foundation Industrial Initiative,* 499 F. Supp. 2d 606 (D.N.J. 2007) ("*Gross III*"), and *In re Nazi Era Cases Against German Defendants Litigation,* 320 F. Supp. 2d 235 (D.N.J. 2004) ("*Gross I*"), we do not repeat them here.[1] Rather, we briefly summarize the history and facts, insofar as they aid the present discussion.

The claims here involve reparations for Nazi-era slave labor, forced labor, appropriation of personal property, and dishonored insurance policies. As early as 1998, the United States and German governments, aware of the significance of the claims and

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[1] Several other cases have also detailed the history of the Berlin Accords and the reparation claims at issue here. *See generally Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396 (2003); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG,* 65 F. Supp. 2d 248 (D.N.J. 1999).

the seriousness of the risk posed to the German economy, encouraged negotiations between the plaintiffs and the defendant German corporations. The negotiations involved senior diplomatic executives from both the U.S. and German governments, specifically and respectively former Deputy Secretary of the Treasury Stuart Eizenstat and Count Otto Lambsdorff, chief negotiator for former German Chancellor Gerhard Schroeder. Several German companies came together as the German Foundation Industrial Initiative ("the Initiative"), which acted as the negotiating arm of the German industry. Representing the claimants were plaintiffs' attorneys who had filed the U.S. civil actions.

After many months of intense negotiations and significant lucubration, on July 17, 2000, a diplomatic agreement, commonly referred to as the Berlin Accords or the Berlin Agreements, was reached as a means of resolving these long-standing claims. Under the agreement, the German Foundation "Remembrance, Responsibility and the Future" ("the Foundation") was established as the intended, exclusive forum for receiving, processing, and paying reparation claims at issue here. Germany and the German companies each agreed to contribute DM 5 billion to fund the Foundation. The plaintiffs' lawyers agreed to dismiss with prejudice the numerous pending litigations, so that the victims would receive payment through the Foundation rather than civil actions and that the German companies would achieve "all-embracing and enduring legal peace."

The Berlin Accords consist of (1) the Joint Statement, (2) the Executive Agreement between the United States and Germany, and (3) the Foundation Law. The Joint Statement – formally titled "The Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Remembrance, Responsibility and the Future'" – sets forth a goal of the Foundation, which is to "provide dignified payments to hundreds of thousands of survivors and to others who suffered from wrongs during the National Socialist era and World War II." Joint Statement, pmbl. ¶ 12. The Joint Statement commits the German government and German industry to provide DM 10 billion in capitalization. As structured, the Initiative would collect DM 5 billion from individual German companies and then transfer the money to the Foundation. Particularly significant for this case, the last sentence of Paragraph 4(d) of the Joint Statement states:

> German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

The second document, the Executive Agreement, outlines the U.S. and German governments' commitments to the Foundation and obligates the United States Executive, in all cases for which it is notified of a claim against a German company arising out of the WWII era, to file a statement of its foreign policy interests with the court in which the claim is

pending, stating that United States' foreign policy interests favor resolution through the Foundation. The third document, the Foundation Law, is codified under German law and establishes the Foundation as the legal entity for processing claims and distributing the DM 10 billion fund.

On May 30, 2001, the German legislature declared "legal peace," triggering the obligations of the German government and the German companies to each pay DM 5 billion to the Foundation. The German government made timely payment, but the Initiative did not complete payment until December 2001, at which point it had transferred DM 5.1 billion, which included DM 100 million as the "interest" designated in Paragraph 4(d) of the Joint Statement.

Due to the delay in the Initiative's payment and the differing assertions of what the "interest" provision mandated, several claimants filed suit, attempting to enforce the "interest" provision of the Joint Statement. In June 2002, Elly Gross and others filed their complaint as third-party beneficiaries seeking recovery for breach of contract against the Initiative and against its founding companies. They alleged that the German corporations owed interest in excess of the DM 100 million already paid, based on the Initiative's financial obligation from and after July 17, 2000, the date the Joint Statement was signed. In July 2003, Bernard and Barbara Schwartz Lee brought a similar breach of contract action against Deutsch Bank AG and Dresdner Bank AG. They

allege that the two banks agreed to pay interest earned on their payment from December 14, 1999.

These complaints were assigned to Judge Bassler. The Initiative and the defendant corporations moved to dismiss the complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) and argued, in the alternative, that the claims were nonjusticiable. In a single opinion, the district court held that the claims were not justiciable. *Gross I,* 320 F. Supp. 2d at 254. On appeal, we reversed, holding that, while the claims implicated foreign policy issues within the realm of the Executive Branch, the case was nevertheless justiciable. *Gross II,* 456 F.3d at 377-91. We also noted that "[a] court would face at least two questions on the merits of this dispute: (1) is the Joint Statement, or part of the Joint Statement, enforceable as a private contract, and (2) if so, what 'interest' obligation, if any, did the parties intend for the German Foundation Industrial Initiative?" *Id.* at 387.

On remand, the cases were reassigned to Judge Debevoise. Among other motions, defendants in the *Gross* case moved to dismiss under Rule 12(b)(6) on the basis that the claims were not privately enforceable. Defendants in the *Schwartz Lee* case moved to dismiss on the basis of a lack an enforceable December 1999 contract. In a single opinion, Judge Debevoise dismissed both complaints, holding that the Joint Statement is not a contract but a political document and thus does not confer a private cause of action on the plaintiffs. *Gross III,* 499 F. Supp. at 610.

Plaintiffs in both cases timely appealed on September 11, 2007.

II. Standard of Review and Jurisdiction

The district court had diversity jurisdiction under 28 U.S.C. § 1332(a)(2).[2] We have jurisdiction under 28 U.S.C. § 1291. We review *de novo* the district court's dismissal of the action under Federal Rule of Civil Procedure 12(b)(6). *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008); *see also In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 461 (3d Cir. 2000) ("*De novo* means [that] . . . the court's inquiry is not limited to or constricted by the . . . record, nor is any deference due the . . . conclusion [under review]." (quotation omitted)). In our plenary review, we apply the same legal standard of determining whether a plaintiff has stated a valid claim, *viz.* "'a complaint with enough factual matter (taken as true) to suggest' the required element." *Phillips*, 515 F.3d at 234 (*quoting Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)). We must accept the complaint's allegations as true and draw all reasonable inferences in favor of the non-movant. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003).

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[2] *Gross* Appellants also contend that the district court had federal question jurisdiction under 28 U.S.C. § 1331, but they have not briefed the issue. Judge Bassler, held that the court had diversity jurisdiction only, *see Gross I*, 320 F. Supp. at 238-39, and we need not address the issue here.

Appellants ask us to determine whether the Joint Statement confers a private cause of action for their breach of contract claim. If it does, then Appellants' complaints are "a proper exercise of [their] 'right . . . to seek judicial relief from injuries caused by another's violation of a legal requirement.'" *See McKesson Corp. v. Islamic Republic of Iran,* 539 F.3d 485, 488 (D.C. Cir. 2008) (*quoting Cannon v. Univ. of Chicago,* 441 U.S. 677, 730 n.1 (1979) (Powell, J., dissenting)). We review the interpretation of an international agreement *de novo. United States ex rel. Saroop v. Garcia,* 109 F.3d 165, 167 (3d Cir. 1997); *see also McKesson,* 539 F.3d at 488; *United States v. Al-Hamdi,* 356 F.3d 564, 569 (4th Cir. 2004) ("Interpretation of an international treaty is an issue of law subject to de novo review.").

III. Application of the Law of International Agreements

In setting forth our analysis, we reiterate that we do so only to the extent necessary to supplement the well-reasoned analysis of the district court. Below, we first confirm the district court's turn to the law of international agreements as providing the legal framework for examining the Joint Statement. Next, applying those principles, we expand on some additional points which warrant further discussion here.

A.

At the outset, Appellants contend that Judge Debevoise erred by applying treaty law as opposed to federal common law. But we do not see merit in this argument. The events leading to the Berlin Accords evince an unprecedented diplomatic effort to create an international agreement establishing a forum for the resolution of certain reparation claims and also to dispose of the pending legal actions.

As Judge Debevoise noted, "July 17, 2000, was the occasion of one of the most remarkable diplomatic achievements since the end of World War II." *Gross III,* 499 F. Supp. at 608. It was on that day that eight sovereign nations, a consortium representing numerous German companies, an international organization devoted to Nazi-era claims, and U.S. plaintiffs' attorneys together signed the Joint Statement of the Berlin Accords. Appellants cannot reasonably dispute the significant political nature of the talks leading to the Accords. Granted, one objective was to settle then-pending U.S. litigation between the plaintiffs and the defendant German companies, but we weigh that private aspect of the resolution against the Berlin Accords' political, diplomatic, and historical significance. The creation of the Berlin Accords was more than a mere settlement; it was a profound expiation by the Federal Republic of Germany and German companies. Indeed, from the start of the negotiations, Deputy Secretary Eizenstat, the lead U.S. negotiator, "was determined that the responsible foreign government [i.e., Germany], not just private

companies, would have to be directly involved and directly engaged through a senior official who would be [Eizenstat's] counterpart." Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* 215 (2003).

We recognize that the Joint Statement is not a formal treaty; nevertheless, it constitutes part of the understanding reached among sovereign nations and private parties. Negotiations occurred during plenary sessions comprising high-level executives of foreign nations. The signatories of the Joint Statement itself includes the representatives of eight different nations. Further, the Joint Statement has meaning only in the context of the entire Berlin Accords. Indeed, the Joint Statement by itself is incomplete, as it talks of the Foundation, but understanding what the Foundation is requires resort to the Foundation Law. In sum, the Joint Statement appears to be a unique document, the objectives of which are to memorialize the efforts of the diplomatic talks resolving both political and legal issues. Thus, for at least these reasons, we agree with the district court that the law of international agreements provides the appropriate jurisprudential guidance in the analysis of whether the Joint Statement creates a private cause of action.

B.

To ascertain whether an international agreement creates a private cause of action, we first look to the

text of the agreement. *See United States v. Alvarez-Machain,* 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). At the same time, however, a court has greater leeway to look beyond the words of an international agreement. *See, e.g., Air France v. Saks,* 470 U.S. 392, 397 (1985) ("'[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" (*quoting Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-32 (1943))). Moreover, "the public acts and proclamations of [foreign] governments, and those of their publicly recognized agents, in carrying into effect th[e] treaties, though not made exhibits in th[e] cause, are historical and notorious facts, of which the court can take regular judicial notice." *United States v. Reynes,* 50 U.S. (9 How.) 127, 147-48 (1850); *see also El Al Israel Airlines, Ltd. v. Tseng,* 525 U.S. 155, 167 (1999).

In general, a court's "role is limited to giving effect to the intent of the [t]reaty parties." *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 185 (1982). Thus, clear language controls unless it "'effects a result inconsistent with the intent or expectations of its signatories.'" *Id.* at 180 (*quoting Maximov v. United States,* 373 U.S. 49, 54 (1963)). In line with this precedent, and regardless of whether we apply any presumption for or against private enforceability, our duty is to ascertain whether the signatories of the

Joint Statement intended to permit a private cause of action against the German companies.

Our examination of the text of the Joint Statement and the entire Berlin Accords supports the district court's rationale and conclusion. We discern a strong intent on the part of the participants to enter into an agreement that is not enforceable through a private cause of action. First, the Joint Statement, along with the Berlin Accords as a whole, aspires to something other than simply the creation of a private, bargained-for exchange. One specific objective was to send "a conclusive, humanitarian signal, out of a sense of moral responsibility, solidarity and self-respect." Joint Statement, pmbl. ¶ 5. Another clear purpose was for the German companies to receive "all-embracing and enduring legal peace." *See* Executive Agreement, pmbl. ¶ 10, and arts. 2(1), 2(2), 3(1); Joint Statement, pmbl. ¶ 13, and ¶ 4(b); Foundation Law, pmbl. ¶ 6. Even without any presumptive approach, this language strongly connotes an intent not to create a right of private action for only some of the Joint Statement's participants.

Second, as the district court noted, the Joint Statement uses language that is generally consistent with a non-binding political document. The signatories of the Joint Statement refer to themselves as "participants," not as "parties." Joint Statement ¶¶ 1-4. The participants "declare" rather than "agree" or "undertake." *Id.* ¶ 1. The title of the document itself suggests a non-binding arrangement. *See* Staff of S. Comm. on Foreign Relations, 106th Cong., Print No.

106-71, *Treaties and Other International Agreements: The Role of the United States Senate* 60 (Comm. Print 2001) ("Joint statements of intent are not binding agreements unless they meet the requirements of legally binding agreements, that is, that the parties intend to be legally bound."). Each of these textual clues points towards a document without privately enforceable rights.

It is true, as Appellants point out, that some language of the Joint Statement can be read as suggesting binding obligations. For instance, Paragraph 4(d) does use the terms "will" and "shall" when describing the steps that the German companies intend to take. Appellants argue that such language should be read as imposing legally enforceable obligations on the German companies. But these few examples cannot overcome the contrary language indicating a non-binding nature. The Joint Statement contains insufficient rights-granting language to confer on Appellants a private cause of action.

Appellants also rely too much on textual hair-splitting between "shall" and "will," as used in the Joint Statement. Specifically, Gross argues that "shall" is used with judicially enforceable acts and "will" with unenforceable acts. Thus, their argument goes, things that "will" be done are not privately enforceable, but things that "shall" be done are enforceable. We disagree with the alleged subtlety. For example, Paragraph 4(d) uses both "shall" and "will" in referring to the intended actions of the German companies: "the DM 5 billion contribution of the

German companies *shall* be due"; "[t]he German companies *will* make available reasonable advanced funding"; "German company funds *will* continue to be collected." Joint Statement ¶ 4(d) (emphases added). The Joint Statement also uses "shall" and "will" interchangeably with the German government and the German companies. *Id.* ¶¶ 4(a), 4(d). Even if a clear difference in meaning exists between "shall" and "will" – and we are not convinced there always is, *see Hewitt v. Helms,* 459 U.S. 460, 471 (1983) (characterizing "shall," "will," and "must" as "language of an unmistakably mandatory character") – the distinction is not borne out in the Joint Statement's text.[3]

Appellants also propose that the district court erred by not severing the last sentence of Paragraph 4(d) from the rest of the Joint Statement. According to their argument, severability permits that sentence to be the grant of private enforceability. Without doubt, treaties and international agreements can include sections that are privately enforceable amidst sections not privately enforceable. *See Lidas, Inc. v. United States,* 238 F.3d 1076, 1080 (9th Cir. 2001) (holding that the United States-France Income Tax Treaty's "exchange of information provisions . . . are severable from the double taxation provisions"); *United States v. Postal,* 589 F.2d 862, 884 n.35 (5th

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[3] We note in passing that Schwartz Lee does not see any distinction between "shall" and "will" and considers both to be mandatory. Schwartz Lee Appeal Br. 34 ("The words 'shall' and 'will' indicate the binding nature of the agreement.").

Cir. 1979) ("A treaty need not be wholly self-executing or wholly executory."); *see also* Restatement (Third) Foreign Relations Law of the United States § 111 cmt. h (1986) ("Some provisions of an international agreement may be self-executing and others non-self-executing."). And we do not ignore these precedents. The test here is not, however, an overly formalistic application of any particular doctrinal rule. Rather, our charge is to remain true to what the participants envisioned as their intended outcome, as shown through interpretative methods discussed above. In this case, the Joint Statement's language does not lend itself to the dichotomous approach urged by Appellants. Excision of a single sentence from the body of the Joint Statement, and from the entire Berlin Accords, invites departure from the participants' intentions.

At oral argument, Appellants' counsel repeated their contention that it would "have been an act of temporary insanity for experienced counsel to have agreed to dismiss sixty cases with prejudice prior to payment, without the existence of a judicially enforceable means of insuring compliance." But we think this assertion is tenuous and overstates the situation. As the district court recognized, Appellants' counsel were not dismissing the actions with only the slim hope or gamble that the German companies might proceed with their payments. Counsel dismissed the complaints, in part, because the Joint Statement had the support and backing of the governments of both the United States and the Federal

Republic of Germany. Indeed, but for the actions of President Clinton and Chancellor Schroeder, it is questionable whether the negotiations would have been fruitful. *See Imperfect Justice* 243-58 (describing the critical involvement of President Clinton and Chancellor Schroeder during the negotiations in December 1999). Had the German companies opted to not complete their payments to the Initiative, serious political consequences and executive discomfiture would have resulted.

Moreover, despite Gross's argument to the contrary, the district court did not find that Appellants' only recourse rests exclusively with the German Ministry of Finance. The assertion runs counter to the undisputed fact that Appellants always retained the option to reopen litigation through Federal Rule of Civil Procedure 60(b). Indeed, Appellants could have utilized that procedure, but, to avoid jeopardizing the entire, politically sensitive resolution and the payment of the DM 10 billion to the victims, claimants declined to move to reopen litigation under Rule 60(b). *See In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 442 (D.N.J. 2002). Instead, they asked the court to define and enforce the defendants' "interest" obligation. On July 23, 2002, the district court declined to do so, holding that jurisdiction to enforce the Joint Statement was absent. *Id.* at 450-51. Appellants chose not to appeal that decision. What the district court in the present case concluded was that, given the Foundation's procedure and the option under Rule 60(b), the

participants to the Joint Statement exhibited, through the text and structure of the Berlin Accords, an intent not to legally bind other participants by a contractual right enforceable through U.S. litigation. In our view, the district court correctly construed the terms of the Joint Statement and the arduous negotiations leading to the Joint Statement as manifestations of all participants' intentions to implement a non-judicial procedure for resolving further disputes.

C.

Appellants urge us to consider the litigious context in which the Joint Statement was drafted. In this context of settling class action lawsuits, Gross argues, the Joint Statement must be viewed as a quasi-settlement fashioned after a settlement agreement pursuant to Federal Rule of Civil Procedure 23. We are cognizant of the drafting environment, but we remain convinced that the manifested intentions of the participants were to create a document that set forth the objectives of the negotiations without granting privately enforceable contractual rights, other than any provided by the Foundation Law. If the contextual evidence does anything, it strengthens our belief that the participants to the Joint Statement did not contemplate an agreement which would require further legal wrangling in courts.

To the extent that the district court considered the history of the Berlin Accords, we agree with the court's reliance on the general approach set forth in

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985). Although *Frolova* concerns a formal treaty, the factors listed are just as applicable here in analyzing whether the historical context surrounding the Joint Statement evinces an intent to confer privately enforceable rights.

D.

We also briefly address Gross's position that the Supreme Court has implicitly rejected the district court's approach in assessing the private enforceability of the Joint Statement. Gross relies upon *Medellín v. Texas*, 128 S. Ct. 1346 (2008), and its analysis of whether the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, the United Nations Charter, and the International Court of Justice Statute were self-executing treaties. In Appellants' view, *Medellín* does away with any presumption against self-execution of treaties.

An overly strict reliance on the concept of "self-executing" versus "non-self-executing" treaties may be misleading in this case. A self-executing treaty is one which "do[es] not require domestic legislation to give [it] the full force of law." *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir. 2006) (*citing Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984)). By itself, the status of "self-executing" does not answer the question of whether a document creates a private right of enforcement. *See* Restatement (Third) of Foreign Relations Law of the United

States § 111 cmt. h (1986) ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); *see also United States v. Li*, 206 F.3d 56, 68 (1st Cir. 2000) (*en banc*) ("[T]he self-executing character of a treaty does not by itself establish that the treaty creates private rights."). Thus, even if we were faced with a treaty, *Medellín*'s self-execution discussion does not complete the picture.

As we see it, *Medellín* does not undermine the district court's analysis. The Supreme Court recognized that, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Medellín*, 128 S. Ct. at 1357 n.3 (*quoting* Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1986)). We have agreed with this approach, *see Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979), as have several of our sister courts. *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 389-90 (6th Cir. 2001); *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) ("[A]s a general rule, international agreements, even those benefiting private parties, do not create private rights enforceable in domestic courts."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 60-61 (1st Cir. 2000) (*en banc*); *Goldstar (Panama) S.A. v. United States*, 967 F.2d

965, 968 (4th Cir. 1992); *Canadian Transport Co. v. United States,* 663 F.2d 1081, 1092 (D.C. Cir. 1980). Thus, when determining the intent of the Joint Statement's participants, we keep in mind the accepted approach that, "[w]hen no [privately enforceable] right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

Again, we emphasize that we do not apply a strict presumption in this case. Rather, we draw from the state of international agreement law to understand better what the text of the Joint Statement teaches about the intentions of the signing participants. Being sophisticated negotiators and litigants, the participants worked not in a vacuum but in the international negotiating arena. International agreement law therefore acts as a useful judicial prism through which to view the textual evidence of the participants' intentions.

E.

Finally, we note that the issue of whether the "interest" provision is a privately enforceable contractual right can be seen from another vantage point, which we believe confirms that the dispute here is not based on a privately enforceable right. Appellants have characterized the present "interest" claim as

being completely distinct from a claimant's application for restitutionary funds. Framed as such, the pending lawsuit does not appear to be asking for a larger restitutionary payment for Elly Gross or the other plaintiffs. This seems the right strategy because, if the claim were for an explicit request for a larger restitution-based payment, the case would surely fail. Such a claim would be covered exclusively by the process set forth in the Foundation Law.

When we look closer, however, and consider the potential result had Appellants been successful, the requested relief reveals itself as a request for increased restitutionary funds for Ms. Gross and the other plaintiffs. As we see it, Appellants' contention is that each plaintiff has not received the appropriate amount of money under plaintiffs' interpretation of the Joint Statement because the German companies have not paid enough "interest." We recognized as much in our prior opinion. *See Gross II,* 456 F.3d at 380 ("It is true that a judgment for the claimants would require payment to the Foundation, translating to increased payments to victims."). Viewing the pending suit from this perspective further confirms the district court's analysis and conclusion that the signing participants of the Joint Statement did not intend for the "interest" provision to confer a privately enforceable contractual right on only some of the signatories.

To the extent Appellants read *Gross II* as effectively deciding the issue before us today, that is error. The issue in *Gross II* was only whether the case was

justiciable. Justiciability involves, for the most part, concerns of separation of powers. *Nixon v. United States,* 506 U.S. 224, 252-53 (1993) (Souter, J., concurring) ("[T]he political question doctrine is 'essentially a function of the separation of powers,' existing to restrain courts 'from inappropriate interference in the business of the other branches of Government. . . .'" (citation omitted) (*quoting United States v. Munoz-Flores,* 495 U.S. 385, 394 (1990))). The question we decide today, on the other hand, is one grounded in the intentions of the signatories to the Joint Statement. *See Sumitomo,* 457 U.S. at 185 ("Our role is limited to giving effect to the intent of the [t]reaty parties."). Thus, a particular claim may be justiciable, in that it is not best reserved for the Executive Branch, but may nevertheless lack a foundational cause of action because that is what the participants contemplated.

IV. Application to *Schwartz Lee* Plaintiffs

The *Schwartz Lee* Appellants dispute the propriety of applying the judgment to dismiss the *Gross* complaint to the *Schwartz Lee* complaint. They contend that the district court could not dismiss their complaint because the defendant banks in the *Schwartz Lee* case (i.e., Deutsche Bank AG and Dresdner Bank AG) never moved to dismiss based on the lack of a private cause of action. Rather, the Banks' motion to dismiss asserted that no enforceable contract existed between plaintiffs and defendants.

First, we note that the two *Schwartz Lee* plaintiffs are members of the putative class in the *Gross* action. Barbara Schwartz Lee and Bernard Lee both averred that they are beneficiaries of the Foundation. Schwartz Lee Compl. 4-5. The putative class in the *Gross* case comprises all beneficiaries of the Foundation. Gross Compl. 3. Also, the two defendant banks in *Schwartz Lee* are individually named as defendants in the *Gross* case.

Second, although docketed as separate cases, the two have proceeded as if one. In *Gross I,* Judge Bassler issued a single opinion that temporarily disposed of both actions. On appeal in *Gross II,* we reviewed that dismissal as if the two cases were a single action. Likewise, when remanded to the district court, the litigants continued on a single course with but minor differences in their "interest" calculations. Arguments for the dispositive motions were heard during a single session before Judge Debevoise on April 17, 2007.

The situation before us does not raise fairness concerns sought to be addressed by the doctrines of issue and claim preclusion. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n,* 288 F.3d 519, 525 (3d Cir. 2002) ("Th[e] general rule [of collateral estoppel] is subject to a number of equitable exceptions designed to assure that the doctrine is applied in a manner that will serve the twin goals of fairness and efficient use of private and public litigation resources."). Schwartz Lee's attorneys had notice that the Initiative moved to dismiss the complaint as

privately unenforceable. Furthermore, in a letter to the district court dated November 22, 2006, counsel for plaintiffs in both *Gross* and *Schwartz Lee* presented arguments countering the Initiative's position that the Joint Statement was not privately enforceable. Counsel presented their arguments on the letterhead of Lite DePalma Greenberg & Rivas, LLC, local counsel for both sets of plaintiffs. The letter was signed by 1) Burt Neuborn, counsel for *Gross* plaintiffs; 2) Michael Hausfeld and Agnieszka Fryszman, counsel for *Schwartz Lee* plaintiffs; and 3) Allyn Z. Lite, "Plaintiffs' Liaison Counsel." The letter set forth a cogent summary of the plaintiffs' position without distinguishing between the two cases. From the district court's perspective, plaintiffs in both cases were aware of and addressed a common basis for dismissal.

Moreover, Schwartz Lee has not presented any argument or position overlooked by the district court. Thus, even if we were to vacate the district court's dismissal of the *Schwartz Lee* complaint, the only logical outcome after remanding would be dismissal. Accordingly, we find no error in the district court's dismissal of Schwartz Lee's complaint.

V. Conclusion

For the foregoing reasons, we affirm the district court's dismissal of the complaints.

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APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-3726 & 07-3727

ELLY GROSS; ROMAN NEUBERGER;
JOHN BRAND, in their individual capacities as
third-party beneficiaries of the agreements leading
to the establishment of the German Foundation
"Remembrance, Responsibility and the Future",
as representatives of all German Foundation
beneficiaries; SYLVIA GREENBAUM,

Appellants in 07-3726

v.

THE GERMAN FOUNDATION INDUSTRIAL
INITIATIVE, and its constituent managing companies;
ALLIANZ AG; BASF AG; BAYER AG; BMW AG;
COMMERZBANK AG; DAIMLERCHRYSLER AG;
DEUTSCHE BANK AG; DEGUSSA-HUELLS AG;
DEUTZ AG; DRESDNER BANK AG; FRIEDR
KRUPP AG HOESCH KRUPP; HOECHST AG;
RAG AG; ROBERT BOSCH GMBH, SIEMENS AG;
VEBA AG; VOLKSWAGEN AG, sued individually;
and as members of the German Foundation
Industrial Initiative

BARBARA SCHWARTZ LEE; BERNARD LEE,
Appellants in 07-3727

v.

DEUTSCHE BANK, AG; DRESDNER BANK, AG

On Appeal from the United States District Court
for the District of New Jersey
(Civ. Action Nos. 02-2936 and 03-3181)
District Judge: Honorable Dickinson R. Debevoise

Argued October 29, 2008

Before: McKEE, NYGAARD, and MICHEL,*
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was argued on October 29, 2008. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered August 15,

---

* The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

2007, be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: December 10, 2008

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APPENDIX C

DISTRICT COURT OPINION

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLY GROSS, et al. Plaintiffs, v. THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE; and ALLIANZ AG; BASF AG; BAYER AG; BMW AG; COMMERZBANK AG; DAIMLER-CHRYSLER AG; DEGUSSA-HULS AG; DEUTSCHE BANK AG; DEUTZ AG; DRESDENER BANK AG; HOECHST AG; RAG AG; ROBERT BOSCH GmbH; SIEMENS AG; VEBA AG; THYSSENKRUPP AG; and VOLKSWAGEN AG, jointly and severally in their respective capacities as principals, founders, and alter egos of the GERMAN FOUNDATION INDUSTRIAL INITIATIVE, Defendants.	Civ. No. 02-2936 (DRD) **OPINION** (Filed Sep. 6, 2007)

Barbara Schwartz Lee and Bernard Lee	:	Civ. No. 03-3181 (DRD)
Plaintiffs,	:	
v.	:	
Deutsche Bank, AG, and Dresdner Bank, AG	:	
Defendants.	:	

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I. Introduction

July 17, 2000, was the occasion of one of the most remarkable diplomatic achievements since the end of World War II. The efforts of two extraordinary diplomats, Secretary Stuart E. Eizenstat, representing the United States, and Count Otto Lambsdorff, representing the Federal Republic of Germany, had, after approximately 19 months of negotiations, secured the signing of two documents that would lead to the creation of the Foundation, "Remembrance, Responsibility and Future" (the "Foundation"), to compensate the victims for wrongs against them committed by German companies during the Nazi-era and to provide an exclusive forum in which the victims could assert their claims.

The documents were i) the Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility, and the Future" (the "Joint Statement") and ii) Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation "Remembrance, Responsibility and the Future" (the "Executive Agreement"). Shortly thereafter, the German Bundestag enacted a Law on the Creation of a Foundation "Remembrance, Responsibility and Future" (the "Foundation Law") that, among other things, established the

Foundation as a German sovereign instrumentality and as the "exclusive remedy and forum" for resolution of claims against German companies arising out of the Nazi-era and World War II. Collectively those instruments were called the "Berlin Accords."

These two diplomats had mediated so successfully that the Joint Statement was signed by six eastern European countries, Israel, Germany, the United States, seventeen German companies that had established the German Economy Foundation Initiative ("GEFI" or the "Initiative"), the Conference on Jewish Material Claims Against Germany, Inc., and class-action attorneys representing plaintiffs in some of the then pending United States lawsuits against German companies on account of Nazi-era depredations. The Joint Statement provided, among other significant provisions, that DM 10 billion contributed by the German Government and German companies was to be distributed to former National Socialist slave and forced laborers, for other personal injury, for damages to property and for a Future Fund to fund ongoing projects to prevent religious and ethnic intolerance in Germany.

The Joint Statement provided that the DM 5 billion contribution of the German companies "shall be due and payable to the Foundation and payments from the Foundation shall begin once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts . . . are finally dismissed with prejudice by the courts." The initial portion of the DM 5 billion German

Government contribution was to be made available to the Foundation by October 31, 2000. The remainder of the German Government contribution was to be made available to the Foundation by December 31, 2000. Para. 4(d) of the Joint Statement concluded: "German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM."

There was an unexpected delay in obtaining dismissal with prejudice of all the pertinent lawsuits against German companies in the United States courts, and it was not until May 30, 2001, that the Bundestag announced that adequate legal security had been achieved, purporting thereby to trigger the time for the German companies' payment called for by Para. 4(d) of the Joint Statement.

The German Government made its payments in a timely manner. On various occasions after the May 30, 2001 Bundestag announcement, the German companies paid, according to GEFI (but disputed by Plaintiffs), DM 5.1 billion to the Foundation. The Foundation is fully organized and is carrying out its important humanitarian work compensating victims and is pursuing the functions of the Future Fund.

Notwithstanding this felicitous state of affairs, a dispute has arisen between the Plaintiffs in the two cases pending before the Court, who are victims entitled to compensation from the Foundation, and

the German companies that were the members of GEFI. Plaintiffs contend that the German companies have failed to comply with their obligations under Para. 4, and, in particular, to pay to the Foundation the interest specified in that paragraph. It is the Plaintiffs' contention that this language contains no ceiling and requires the companies to pay interest on all funds the Initiative collected from the time of their receipt of those funds until payment to the Foundation, or in the alternative, to pay interest on the companies' share from December, 1999.

The *Gross* Plaintiffs differ from the *Schwartz Lee* Plaintiffs about the period for which interest is owing, and the *Gross* Plaintiffs take different positions at different times and places as to the period for which interest is owing. The *Schwartz Lee* Plaintiffs argue that this obligation to pay interest is on the entire DM 10 billion (or at least the companies' DM 5 billion), running from December 14, 1999, when agreement was reached on the DM 10 billion, or from December 17, 1999, when the participants in the negotiations announced their agreement upon the DM 10 billion figure. Occasionally the *Gross* Plaintiffs seem to adopt the *Schwartz Lee* position, but on the present motions they argue primarily (but not exclusively) that the obligation to pay interest commenced on July 17, 2000, the date of signing the Joint Statement.

The German companies contend that the additional DM 100 million was a fixed amount to be

added to the DM 10 billion cap to enable the representatives of the victims to reach agreement on the allocation of the DM 10 billion capped amount.

Having reviewed the full record submitted in connection with the pending motions as well as the briefs and arguments of counsel, the court concludes as follows:

1. The Joint Statement is a political document that does not confer upon the signatories, or any portion of them, contractual rights which can be enforced in United States courts. Consequently, Defendants' motion to dismiss each of these cases should be granted.

2. In the alternative, were the Joint Statement found to create contractual obligations between Plaintiffs and the Defendants, enforceable in United States courts, Para. 4(d) concerning interest is ambiguous, requiring resort to the history of the negotiations to determine its meaning.

3. The history of the negotiations of the Berlin Accords establishes, as the Defendants contend, i) in December, 1999, the negotiating parties reached an understanding that the German Government and the German companies would pay into the Foundation a capped amount of DM 10 billion in exchange for "legal peace" with no agreement to pay interest; ii) in March, 2000, the negotiating parties reached an understanding that GEFI would pay an additional DM 100 million denominated as "interest" in order to enable the victim groups to reach agreement on the

allocation of the DM 10 billion, but there was no other commitment on the part of the German companies to pay interest in addition to the DM 100 million; between March, 2000, and July 17, 2000, when the Joint Statement was executed, Secretary Eizenstat and the Plaintiffs' attorneys made repeated demands that the German companies pay interest on their DM 5 billion share of the DM 10 billion total sum. All of these demands were rejected, and as a consequence Para. 4(d) of the Joint Statement cannot be construed as requiring the German companies to pay to the Foundation more than DM 5.1 billion.

4. If this court has authority under the Joint Statement to do so, it would construe the Joint Statement as not requiring the German companies to pay the Foundation more than DM 5.1 million and deny the summary judgment motions of the *Gross* and *Schwartz Lee* Plaintiffs and grant summary judgment to the Defendants, dismissing both complaints on the merits.

II. Background

A. *Litigation*: On March 13, 1996, the German Federal Constitutional Court decided *Krakauer v. Federal Republic of Germany*, Federal Constitutional Court, Bul 33/93 (March 13, 1996), a decision that was widely interpreted to lift the bar on World War II era claims against German industry imposed by the London Debt Agreement of 1953. In March, 1998, plaintiffs in the *Gross* case filed *Iwanowa v. Ford*

Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999), seeking redress for the widespread use of slave labor by German industry during the Nazi period. *Iwanowa* was followed by the filing of *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999), and more than 60 additional cases throughout the United States. These cases took different forms, including class actions and single plaintiff cases, and dealt with issues other than slave and forced labor, including insurance policies and bank deposits.

In August, 1998, twelve German companies (later joined by five other funding members) formed GEFI. Dr. Manfred Gentz, then CFO of Daimler/Chrysler, and Dr. Michael Jansen, then Executive Vice-President of Degussa, played leading roles in the establishment of GEFI. GEFI was German industry's response to the proliferation of class actions and other lawsuits in the United States against German companies. It sought to obtain all-embracing and enduring legal peace for German companies by establishing and funding a German Foundation for making payments to certain victims of the National Socialist era and World War II that would be an instrumentality of the Federal Republic of Germany, governed by German institutions and not subject to oversight or review by United States courts.

On or about September 8, 1998, members of GEFI met with Chancellor-elect Gerhard Schroeder to seek support of the German Government for GEFI's objectives, including resolution of the World War II related litigation against German industry

pending in the United States. After that meeting, representatives of GEFI and the German government met with Secretary Stuart E. Eizenstat, then United States Assistant Secretary of State, and sought the assistance of the United States government in resolving the litigation. Secretary Eizenstat entered into discussions with German officials concerning the establishment of one or more funds and helping the German companies obtain legal peace from lawsuits in the United States courts.

On December 14, 1998, Bodo Holmbach, Chancellor Schroeder's chief of staff, and the German ambassador to the United States met with Secretary Eizenstat. They stated that Germany wanted to settle not only the slave labor claims but all other claims against German companies, including those against the banks and insurance companies. Mr. Holmbach officially asked Secretary Eizenstat to work with the German government and industry to resolve the class actions. Secretary Eizenstat agreed to do so as long as the class action lawyers also agreed. He persuaded the Germans that, in addition, the negotiations should include the Eastern European countries, whose forced workers had never been paid, the State of Israel, and the Conference on Jewish Material Claims Against Germany (the "Claims Conference"). During the negotiations that followed, Mr. Holmbach first represented the German government and was succeeded by Count Otto Lambsdorff.

On or about February 8, 1999, the first negotiating session between GEFI and certain plaintiffs'

counsel took place at the State Department. Plaintiffs' counsel urged the use of the Federal Rules of Civil Procedure to resolve the pending litigation. GEFI rejected the use of Rule 23, refusing to accept continued involvement of the United States courts and insisting that the institutions established to provide recompense had to be German and not subject to American oversight. On February 16, 1999, Chancellor Schroeder and twelve German companies released a statement confirming the German companies' intention to fund a private foundation that would make payments to former forced and slave laborers and other victims of National Socialism.

On or about May 12, 1999, the first plenary negotiating session was held in Washington, D.C., involving: i) numerous private lawyers (including Melvin I. Weiss, Esq., Michael D. Hausfeld, Esq., Morris Ratner, Esq., and Professor Burt Neuborne, who acted as spokesmen for the victims; ii) the German defendants acting through GEFI; iii) the Claims Conference; and representatives of six nations with large victim populations – Belarus, Czech Republic, Israel, Poland, Russia, and Ukraine. The session was co-chaired by Mr. Holmbach and Secretary Eizenstat. GEFI and the German government ruled out a United States-style court supervised class action settlement.

As recounted by Secretary Eizenstat: "The first plenary session like the dozen or so that followed over more than a year, were occasions to make set speeches with maximum demands. The real negotiations took

place in small meetings outside the formal sessions, with the plenaries nevertheless bestowing on all parties a sense of involvement." Stuart E. Eizenstat, *Imperfect Justice* 229 (Public Affairs Press 2003).

On or about June 22, 1999, the second plenary negotiating session took place in Bonn. The participants discussed the use of a German Foundation and the use of an Executive Agreement between Germany and the United States as a means of achieving legal peace. On or about July 23, 1999, the third plenary negotiating session took place in Washington, D.C., at which Count Lambsdorff replaced Mr. Holmbach. Agreement in principle was reached on the use of a German Foundation and an Executive Agreement.

The Fourth Plenary session took place on or about August 22-24, 1999, and discussions commenced concerning the size of the Foundation. Various plaintiffs attorneys had been voicing different, but uniformly high, demands, e.g., DM 60 billion, and GEFI was suggesting a dramatically lower amount – DM 1.7 billion. (*Id.* at 240-41). This put Secretary Eizenstat's negotiating skills to a supreme test.

On or about September 6, 1999, the CEOs of the then-16 companies constituting GEFI met with Chancellor Schroeder and agreed to increase GEFI's offer and the German Government agreed to participate. Secretary Eizenstat had persuaded President Clinton to communicate personally with Chancellor Schroeder in an effort to obtain a more substantial commitment by the German companies and the German Government.

He had been thinking in terms of a total commitment of DM 10 billion. As a result, two weeks after GEFI's September 6 meeting with the Chancellor, GEFI raised its offer from DM 1.7 billion to DM 4 billion, and the Chancellor proposed a DM 2 billion in government funds for a total of DM 6 billion. (*Imperfect Justice* at 242-43).

This has been a somewhat bloodless account of the discussions and controversies that took place between the various participants. Secretary Eizenstat's *Imperfect Justice* portrays the charged nature of these interchanges and relates how his and Count Lambsdorff's crucial and continuing interventions prevented the negotiations from collapsing. After the October offer of DM 6 billion from the German side, Secretary Eizenstat's primary efforts were devoted to seeking an increase in this amount and persuading the representatives of the victims to reduce their demands. He concluded that the principal source of additional funds would have to be the German Government and turned once again to President Clinton. In a November 13, 1999, letter to the Chancellor, the President stated that Secretary Eizenstat was acting as his personal representative in insisting that the Germans contribute a total of at least DM 10 billion and that there needed to be "'a significant increase in the contributions from German companies beyond their opening offer of four billion D-marks' and a willingness by the German Government to increase its two billion D-mark contribution, even if spread over two fiscal years.'" At that point, Count

Lambsdorff informed Secretary Eizenstat that the best that could be achieved was a total of DM 8 billion. (*Imperfect Justice* at 248-49).

Various of the victims' lawyers made impossibly high demands and feelings ran high on all sides. Secretary Eizenstat succeeded in obtaining a range of DM 6 billion to DM 10 billion from the German side and DM 10 billion to DM 15 billion from the victims and their lawyers. (*Id.* at 250-51). He was, however, confronted by the German Government's refusal to move from its "absolute maximum" of DM 3 billion by another DM 2 billion. Thus, the German position remained fixed at DM 8 billion. As Secretary Eizenstat expressed it, "[t]he Germans suspected that even if they agreed to settle at 10 billion, it would be only a temporary way station to some higher demand." (*Id.* at 252-53).

Secretary Eizenstat then turned to the class action attorneys and ultimately persuaded them to drop their range to DM 10 billion to DM 11 billion. He then broached his "creative accounting" approach, upon which the *Schwartz Lee* and *Gross* plaintiffs rely so heavily.

> I then engaged in what I could only call creative accounting. I persuaded Lambsdorff and Gentz to add interest that would be earned on the money while we were getting the cases dismissed and setting up the foundation, that would now be one joint private section-federal government organization. They ended up agreeing to pay at least 100 million

> DM in interest. But the most ambitious was my idea to create a "mirror image" fund for the dozens of American companies whose big German subsidiaries had employed slave labor. According to a 1943 Treasury Department list, the most celebrated names included Ford, General Motors, Gillette, IBM, and Kodak, among many others.

(*Id.* at 254).

This plan did not come to fruition. Not surprisingly, the American companies were not interested in participating and, as Secretary Eizenstat stated, "[a]ll my creative accounting still could not bridge the gap, with the Germans stuck at 8 billion and the lawyers at 11 billion." (*Imperfect Justice* at 255). In early December, the lawyers were backtracking, their raising demands. However Count Lambsdorff approached Secretary Eizenstat and told him that "whatever Schroeder might be saying about sticking to 8 billion marks, if [Eizenstat] could organize a unified front from the victims for a settlement of 10 billion marks, the chancellor would rethink his position." (*Id.* at 255-56).

Secretary Eizenstat described what happened next:

> [Obtaining an organized front from the victims] would be no easy task with that fractious coalition. Singer [of the Jewish Claims conference] said that he, Weiss, Neuborne, Swift, and Fagan could accept 10 billion, but Hausfeld was the holdout.

> I went back to Hausfeld and urged him to be a statesman. He now held the agreement in his hands, I said. After a long pause he said, "Okay." But getting to 10 billion marks was not so simple. A few days later, Hausfeld, Weiss, and Neuborne marched into my office and announced they had reached a consensus. Hausfeld crowed proudly that they all would settle at 10.5 billion DM plus the additional costs of administering the foundation. I blew up at them, practically shouting, "You're going to screw it all up over 500 million." They asked to rethink the matter and marched out.
>
> Neuborne and Hausfeld called later in the day to explain that they needed the extra 500 million DM to satisfy all the competing demands. I told them to forget it. Here again, Neuborne was a constructive influence, convincing Hausfeld to give in. Hausfeld then backed away, agreeing to 10 billion if I could raise an additional fund from American corporations. I foolishly said I hoped I could raise the equivalent of another 1 billion DM, or a half billion U.S. dollars, the figure Rintamaki had given me.
>
> They took this as a commitment but agreed to settle with the Germans now and hope I could raise the next later. . . .

(*Id.* at 256).

Secretary Eizenstat telephoned Count Lambsdorff at 9:00 a.m. on Sunday, December 12, 1999, stating

that he had a firm figure of DM 10 billion from the lawyers that the Count could take to Chancellor Schroeder. At 5:00 p.m. Count Lambsdorff telephoned Secretary Eizenstat, informing him that the Chancellor wanted a letter from President Clinton confirming the lawyers agreement accepting the DM 10 billion and guaranteeing to end all legal action. (*Imperfect Justice* at 256).

The agreement for a capped fund of DM 10 billion and for providing legal peace was memorialized in President Clinton's December 13 letter to Chancellor Schroeder and in Chancellor Schroeder's December 14 response. A formal signing ceremony took place on December 17, 1999. (*Imperfect Justice* at 258-59).

After the amount to be paid to the Foundation had been agreed upon, the German companies had to go about the difficult task of raising the DM 5 billion; the German government had to draft the legislation establishing and governing the Foundation; an agreement between the United States and the Federal Republic of Germany had to be drafted; and the various groups of victims had to agree upon allocation of the DM 10 billion. Secretary Eizenstat described the allocation process:

> But the problems with the draft legislation paled by comparison with the three-month torment of deciding how to allocate the 10 billion DM. Whatever semblance of unity there had been among the Eastern Europeans, plaintiffs' attorneys, and Claims Conference in persuading the Germans to pay the

> maximum possible broke into open warfare as they tried to divide the pie. The process brought out the worst in everyone.
>
> . . .
>
> There were essentially three categories of claims that had to be satisfied. First were those of conscripted workers. The issue of how much should be allocated to each pitted Eastern Europeans against the Claims Conference. Second was banking and insurance. Here the principal battle engaged the class-action lawyers, who fought for individual claimants seeking damages for Aryanized assets and unpaid life insurance policies, and the Claims Conference, which sought a large humanitarian fund to help Holocaust victims in general, since most of the claimant families had been killed by the Nazis. And third was the Future Fund, so important to the German companies because it would identify them with project of tolerance and help them raise funds from German companies not implicated in World War II.

(*Imperfect Justice* at 261-62).

Count Lambsdorff and Secretary Eizenstat had hoped to remain uninvolved in these disputes. However, it developed that their intervention was required to help resolve the differences between the various groups. The differences were so vast and the parties so intransigent that, as Secretary Eizenstat put it, "My job was clear. The only way to bring everyone together was for me to persuade Lambsdorff

to forge a joint proposal and ram it down everyone's throat. Even the lawyers were ready. 'Someone needs to break the tie, and we trust you to do it,' Neuborne told me. So Lambsdorff and I set a 'make or break' session for Berlin for March 22-23. We had to put an end to the haggling or let everyone know the entire enterprise would collapse." (*Id.* at 264).

Before the "make or break" session, Count Lambsdorff and Secretary Eizenstat agreed on what they called the "Joint Chairman's Proposal." There followed furious further discussions and secret understandings. At the end of the day, as Secretary Eizenstat stated, "[w]e had the 10 billion DM. We had agreed on how to divide it down to the last pfennig." There remained the question of the mechanics of establishing legal peace, but the allocation was agreed upon. (*Id.* at 268).

There was one aspect of the contentious efforts to reach agreement on the allocation of the DM 10 billion that Secretary Eizenstat did not refer to in *Imperfect Justice*. It became apparent during the bitter negotiations that agreement could not be reached within the DM 10 billion and that DM 100 million more would be needed to fund the amounts allocated to the various categories of participants. In March, 2000, rather than have the whole process break down, GEFI and the German Government agreed that an additional DM 100 million would be paid, but, in order to avoid affecting the agreed upon DM 10 billion cap and thus weaken GEFI's fund raising efforts, and breaching the Government's and

GEFI's commitment to the legislature and public, the additional funds would be designated "interest." This amount appears in Annex B of the Joint Statement, which allocates the DM 10 billion plus precisely DM 100 million in "interest."

Secretary Eizenstat's counterpart, Count Lambsdorff, described the process as follows:

> When it became clear that my American counterpart had incurred certain verbal obligations with the two leading partners, the Polish Government and the World Jewish Congress, which could be only matched by raising the Foundation Initiative's contribution by 100 Mio. DM, after long and arduous talks the Foundation Initiative agreed under the proviso that this additional amount did not enter into the principal of the promised amount in public. This was the genesis of the word "interest", in reality covering the fact that so far the total does not preclude the fact that once the sum was deposited in the Foundation's Account, it generated a much higher interest than this sum and, as a matter of fact, the Future Fund of the Foundation is meant to be financed perpetually from interest earned.
>
> In regard to that issue, on April 19, 2000, I wrote the following in a letter to Deputy Secretary Eizenstat: "In December 1999 the companies of the German Foundation Initiative agreed to do everything to contribute the

> amount of 5 billion DM to the Foundation capital, and in March this year they agreed to a specific allocation of further 100 Mio. DM generated by interest. Although the Initiative's difficulties raising this substantial amount are well known and have been deplored by the German Chancellor and myself publicly, I have no doubt that the Initiative will finally succeed.

(Lambsdorff Decl. at Para. 12, 13).

Even though in December, 1999, all the participants had agreed, in accordance with the Clinton-Schroeder correspondence, that the obligation of the German Government and the German companies was limited to DM 10 billion, Secretary Eizenstat pressed for an agreement to accelerate payment of this sum or to pay interest on it in addition to the DM 100 million pending the attaining of legal peace through the dismissal of the American lawsuits. For the laudable purpose of achieving greater compensation for the victims, Secretary Eizenstat vigorously pursued this objective, repeatedly submitting drafts of a Joint Statement that included provisions that the German company contribution of DM 5 billion would be a "present value" as of a specified date, or would be deposited in an interest-bearing account as of a specified date, or would earn interest from a specified date. The German side uniformly rejected these proposals except that the German Government agreed that the initial portion of its DM 5 billion

contribution would be made available to the Foundation by October 31, 2000, and the remainder of its contribution would be made available to the Foundation by December 31, 2000.

This strenuous, March to July, 2000, negotiating process over what was the equivalent of interest, is referred to in only a passing comment in *Imperfect Justice*:

> But Gentz's greatest concern was over timing of German industry's requirement to pay its 5 billion DM share of the 10 billion DM settlement. To avoid delay, I had suggested a certain date, like January 1, 2001. The Germans had rejected my suggestion, and in a major concession to them, I had reluctantly agreed that no payments would be required until all cases were dismissed. (*Id.* at 276).

The participants continued negotiating the terms of the Joint Statement, reaching agreement on July 12, 2000, on the language that appeared in the final version of the Joint Statement signed on July 17, 2000. Representatives of the United States and Germany signed the Executive Agreement, which, among other things, obligated the United States Government to file an agreed-upon Statement of Interest in support of dismissal of any pending or future Nazi-era litigation. On or about October 19, 2000, an exchange of diplomatic notes brought the Executive Agreement into full force and effect.

On August 12, 2000, the German Bundestag enacted the Foundation Law establishing the German Foundation "Remembrance, Responsibility and the Future." On August 22, 2000, Professor Neuborne was designated by the United States as a trustee of the Foundation to occupy the vacancy set aside for a lawyer representing the victims. He joined Ambassador J.J. Bindenagel, the other United States designated trustee of the Foundation.

On or about August 30, the first meeting of the Board of Trustees of the Foundation took place in Berlin. On or about September 22, the second meeting of the Board of Trustees was held, at which the trustees elected three Directors to manage the day-to-day affairs of the Foundation and adopted a notice to victims and other programs.

On or about October 1, 2000, the German government transferred DM 2.5 billion to the Foundation. On or about December 1, 2000, the German government transferred an additional DM 2.5 billion to the Foundation.

The attorneys for the plaintiffs and for the defendants in the United States Nazi-era cases proceeded to seek their dismissal with prejudice in order to fulfill one of the provisions of the Joint Statement. On November 13, 2000, Judge Bassler permitted voluntary dismissal with prejudice of forty World War II-related cases against German industrial defendants,

including eleven members of the Initiative[1]. Defendants' attorneys assured the court that the financial commitments contained in the Joint Statement would be honored. *See In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000).

On or about December 8, 2000, and December 14, 2000, Chief Judge Mukasey of the Southern District of New York permitted dismissal with prejudice of German insurance cases.

The parties incurred a snag when they sought dismissal of the German banking cases pending before Judge Kram in the Southern District of New York. Although on December 28, 2000, Special Master Charles Stillman recommended dismissal of these cases, on January 20, 2001, Judge Kram denied dismissal. On March 28, Judge Kram denied a motion to reconsider her refusal to permit dismissal despite the fact that the Initiative's founding members issued press statements that they had volunteered to make up any shortfall in the German company contribution.

On May 12, 2001, the Court of Appeals for the Second Circuit issued a writ of mandamus directing Judge Kram to permit dismissal of the German banking cases. On May 18 and 21, 2001, Judge Kram dismissed the German banking cases.

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[1] Several Plaintiffs refused to seek voluntary dismissal, requiring defendants to move for involuntary dismissal.

On May 30, 2001, the German Bundestag announced that "adequate legal security" had been achieved. As of that date at least seven lawsuits against German companies arising out of the Nazi-era and World War II remained pending before United States courts.

On or about August 21, 2000, German companies had advanced DM 2.7 million to the Foundation for start-up costs, particularly for notice to potential claimants. The German companies transferred additional funds to the Foundation beginning in June, 2001.

Controversy arose concerning GEFI's obligation to pay interest, on what Plaintiffs have referred to as "6000 independent contributions during the deferral period," and concerning a credit Allianz and other companies received for contributions they made to the International Commission on Holocaust Era Insurance Claims.

Professor Neuborne, acting in his capacity as a trustee of the Foundation, filed litigation in the Eastern District of New York challenging the insurance credit and seeking to enforce his claim that additional interest was owing. In December, 2001, the German insurance companies made an additional payment to the Foundation of DM 63 million. The lawsuit was withdrawn without prejudice.

III. Procedural History

In June, 2002, Elly Gross and others filed their Complaint as third-party beneficiaries seeking recovery for breach of contract against the Initiative (GEFI) and against its founding companies. They allege that Defendants are obligated to pay interest at the rate of at least 4% per annum on the unpaid balance of the Initiative's DM 5 billion obligation from and after July 17, 2000, the date of signing the Joint Statement, and that Defendants are obligated to pay to the Foundation all interest earned on approximately 6000 contributions the Initiative received from non-members of the Initiative.

In July, 2003, Bernard and Barbara Schwartz Lee brought a similar breach of contract action as third-party beneficiaries against Deutsch Bank AG and Dresdner Bank AG. They allege that in December, 1999, the German companies agreed to pay interest earned on their DM 5 billion from December 14, 1999. The Schwartz Lee complaint also includes a count alleging misrepresentation.

These complaints were assigned to Judge Bassler. The Initiative and the Defendant corporations moved to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(6) and argued, in the alternative, that the claims were nonjusticiable, the political question and act of state doctrines as well as principles of international comity necessitated dismissal. In addition, the Defendants argued that Plaintiffs' complaints were barred by the doctrine of *res judicata*

as well as Plaintiffs' inability to establish Article III standing. *In re Nazi Era Cases Against German Defendants Litig.*, 320 F. Supp. 2d 235 (D.N.J. 2004) *rev'd sub nom. Gross v. German Foundation Indus. Initiative*, 450 F.3d 363. (3d Cir. 2006).

Judge Bassler held that the court had diversity jurisdiction but did not have federal question or supplemental jurisdiction. He found that venue was proper and that Plaintiffs adequately demonstrated that they had standing.

Judge Bassler addressed Defendants' *res judicata* argument. In 2002, a California citizen filed a similar action in *Widerynski v. Deutsche Bank AG*, No.BC 274449 (Cal. Sup. Ct.), alleging, *inter alia* that the same defendants named in the *Schwartz* complaint failed to timely contribute the agreed sum of DM 5 billion, thereby misappropriating interest due to the survivors of Nazi atrocities. Among the grounds on which the California Court dismissed the complaint with prejudice was international comity, concluding "that the German Government has 'exclusive supervision of the Foundation and on the exclusive postwar intergovernmental resolution of matters arising out of the Nazi era'." *Gross*, 320 F. Supp. 2d at 244. Judge Bassler held that the Plaintiffs were not bound by this decision under the doctrine of *res judicata* and observed in a footnote that "[t]he Court notes that the Foundation's responsibility lies primarily in its efforts to distribute compensation to surviving Holocaust victims, not in how monies, including interest, owed it are calculated. Therefore, Defendants' position that

the German Government, specifically via the Ministry of Finance, has exclusive jurisdiction over the interest issue is debatable." *Id.* at 244, n9.

Judge Bassler also addressed and rejected Plaintiffs' contention that Defendants' promise to make "appropriate" interest payments (including the disputed payments) induced the court to dismiss the class actions against the German companies. He noted that Plaintiffs' counsel recognized that the interest issue is ambiguous, and Professor Neuborne acknowledged that "reasonable people can disagree" over the interest issue embodied in Para. 4(d) of the Joint Statement. Judge Bassler concluded that "[c]learly German Industry made no misrepresentation to this Court as to any definable interest obligation." *Gross*, 320 F.2d at 248.

Judge Bassler turned to Plaintiffs' argument that the Joint Statement was a classic bilateral contract that the court should enforce. He noted that "[t]he Joint Statement places the Foundation 'as the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising out of the National Socialist era and World War II'." *Id.* He also noted that the Joint Statement did not delegate similar jurisdictional authority over Para. 4 obligations of governmental and other parties under the Joint Statement, including the obligations of the German Government and German industry to pay principal and interest contributions under Para. 4(d). He concluded, "[a]s such, Defendants' interpretation that the Joint Statement

itself provides that the interest obligations are properly decided by the Foundation appears incorrect. Otherwise, the other directives listed in Para. 4 of the Joint Statement should also rest in the Foundation's 'exclusive remedy and forum[.]' However, that conclusion is tenuous at best from a review of the other directives." *Id.* at 248-9.

Having expressed the foregoing opinions, however, Judge Bassler ultimately concluded that "[n]otwithstanding this Court's reservations over whether the Ministry of Finance does in fact maintain exclusive jurisdiction over the interest issues, the Court is convinced that the political question doctrine precludes adjudication of whether additional interest is owed. That both Germany and the United States have committed the resolution of this issue to diplomacy over litigation is supported not only by the above correspondence but, more importantly, by history." *Id.* at 253. Accordingly, Defendants' motion to dismiss on the ground of nonjusticiability was granted.

Plaintiffs appealed, and the Court of Appeals reversed. *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363 (3d Cir. 2006). The Court held "that adjudicating the 'interest' dispute would not present a nonjusticiable political question." *Id.* at 378. The Court observed that "the 'interest' dispute is distinct from the underlying reparations claims, which led to the creation of the Foundation." *Id.* at 381. It further observed that "[t]he language [of the Berlin Agreements] supports the view that the claims

for which the Foundation is the exclusive forum and remedy, and for which the United States is required to file a Statement of Interest, are reparations and restitution cases, and not the present 'interest' dispute." *Id.* at 383.

As a part of its discussion of the political question doctrine the Court noted that "there is much to support the view of the German Foundation Industrial Initiative that the Joint Statement is a political document" and not a contract, *id.* at 385, but that "the parties' characterizations of the Joint Statement bear primarily on the merits of the 'interest' dispute and not the question of justiciability." *Id.* at 386.

The Court also rejected Defendants' arguments that the District Court should have restrained from adjudicating the claim under the act of state or international comity doctrines. The Court reversed and remanded the case for further proceedings, observing:

> In adjudicating the case a court would have to interpret the Berlin Accords - specifically, Section 4(d) of the Joint Statement – to determine whether there is a binding, contractual "interest" obligation. A court would face at least two questions on the merits of this dispute: (1) is the Joint Statement, or part of the Joint Statement, enforceable as a private contract, and (2) if so, what "interest" – obligation, if any, did the parties intend for the German Foundation Industrial Initiative?

Gross, 456 F.3d at 387.

The case was remanded and, upon Judge Bassler's retirement, reassigned. The parties in each of the cases conferred with the Court and filed four dispositive motions: i) the *Gross* Plaintiffs' motion for summary judgment; ii) the *Schwartz Lee* Plaintiffs' motion for partial summary judgment; iii) the *Gross* Defendants' motion to dismiss the *Gross* complaint for failure to state a claim; and iv) the *Schwartz Lee* Defendants' motion to dismiss the *Schwartz Lee* Complaint.

There were renewed pending motions to dismiss for lack of jurisdiction over the person filed on behalf of Defendants Allianz AG, BASF AG, Bayer AG, BMW AG, Commerzbank AG, DaimlerChrysler AG, Degussa AG (sued as "Degussa-Huells AG"), Deutsche Bank AG, Deutz AG, Dresdner Bank AG, RAG AG, Robert Bosch GmbH, ThyssenKrupp AG (sued as "Friedr, Krupp AG Hoesch Krupp"), Siemens AG and Volkswagen AG.

The Federal Republic of Germany moved in each case for leave to appear amicus curiae.

IV. Gross Plaintiffs' Summary Judgment Motion

The *Gross* Plaintiffs have moved for summary judgment. The reasons they advance to support their interest claims differ somewhat from those of the *Schwartz Lee* Plaintiffs, and, although they rely upon substantially the same evidence to support their respective claims, they interpret the evidence somewhat

differently. Basically, however, their claims will rise or fall together.

A. *The Gross Plaintiffs' Contentions*: The *Gross* Plaintiffs allege that Paras. 4(a) and 4(d) of the Joint Statement constitute legally binding contract obligating Defendants to pay interest on the DM 5 billion from July 17, 2000, the date of signing the Joint Statement, until payment of that sum to the Foundation, at the rate of 4% per annum. According to Plaintiffs, Para. 4(d) provides for a guaranteed DM 100 million interest on the DM 5 billion obligation in connection with a deferral period estimated by the parties on July 17, 2000, to be approximately six months, which translates into annual interest at 4%. Because the deferral period extended much longer than the parties anticipated, interest for that period, according to Plaintiffs, is owed in an amount far greater than DM 100 million. Further, Plaintiffs contend that, because Defendants failed to make full payment on or shortly after May 30, 2001, when they claim the DM 5 billion payment was due, under Section 288(2) of the German Civil Code, interest is owing on the amounts in breach at 8% above the German market rate as calculated under Section 247 of the German Civil Code.

In addition, Plaintiffs assert that, during the deferral period, more than 6,000 small businesses, individuals, and institutions having no connection with Defendants' unlawful World War II activities contributed funds to the Foundation and that the Initiative used interest on the 6,000 contributions to

defray a portion of its DM 5 billion financial obligation to the Foundation. Plaintiffs seek summary judgment ordering Defendants to account for that interest and to pay it to the Foundation.

The Joint Statement is unique in that it is an undertaking signed by 36 private entities[2], as well as by eight nations, and, if fully implemented, would result in dismissal with prejudice of pending litigation between private parties, in return for the payment of governmental and private funds. The specific obligations of the German companies are set forth in Para. 4(a) (to contribute DM 5 billion to the Foundation), and Para 4(d) (to make the contribution "once all [designated] lawsuits against German companies . . . pending in U.S. Courts . . . are finally dismissed with prejudice by the courts," and "to make available reasonable advanced funding to provide appropriate publicity . . . " and to continue to collect funds "on a schedule and in a manner that will ensure that the interest thereon before and after their delivery to the Foundation will reach at least 100 million DM.") Para. 4(g) sets forth the obligation of the Plaintiffs to file motions or stipulations to dismiss with prejudice all lawsuits they have filed currently pending in United States courts against German companies

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[2] Dr. Manfred Gentz signed the Joint Statement on behalf of GEFI's then-16 corporate members. Robert Bosch GmbH subsequently joined GEFI. Nineteen private lawyers signed the Joint Statement.

arising out of the National Socialist era and World War II.

Other paragraphs of the Joint Statement contain the undertakings of Germany, the United States, the participating Central and Eastern European states, and Israel. Plaintiffs contend that, even though the obligations of the government parties cannot be enforced in a court of law, the mutual undertakings of the private parties are enforceable as a binding contract, with the state undertakings constituting conditions precedent, all of which have been performed.

In support of their position Plaintiffs cite *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2002), for the proposition that there can be privately enforceable claims based on firmly established provisions of customary international law similar to Plaintiffs' slave labor claims against German industry. It must be noted that the Alien Tort Claims Act, 28 U.S.C. § 1350, with which *Sosa* was concerned, bears no resemblance whatsoever to the Joint Statement.

Despite the uniqueness of the Joint Statement, Plaintiffs point to the London Debt Agreement of 1953 as the closest international law analogy. The Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3. That Agreement involved close cooperation between governments and private creditors in restructuring post-war Germany's external debt. It was not formally signed by any private parties. Nevertheless, the private rights

acquired by German companies under the London Debt Agreement have been judicially enforced. By the same token, Plaintiffs contend, the obligations of the private parties who did sign the Joint Statement should be enforced.

In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), defendants enforced the Joint Statement against the State of California, successfully arguing that the terms of the financial agreement in Para. 4(a) established a "hard law" judicially enforceable ceiling that invalidated California's attempt to provide additional relief to victims.

In *Winters v. Assicurazioni Generali S.p.A.*, No. 98-9186, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y. Dec. 18, 2000), Defendants, including counsel for GEFI, argued before Chief Judge Mukasey that plaintiffs' promises in Para. 4(g) and Annex A of the Joint Statement generated judicially enforceable "hard law," entitling the Swiss parent of German insurers to dismissal of World War II-related insurance cases. At defendants' request, Chief Judge Mukasey agreed to construe the terms of Para. 4(g), holding that "[a]s applied to this case, the Berlin Agreements constitute, collectively, a settlement agreement" that would bind the plaintiffs. *Id.*

The Plaintiffs' position is well summarized in the following statement:

> In fact, the Joint Statement, a unique public/private hybrid, contains *both* a private settlement agreement between and among

> 36 private signatories, *and* a series of non-binding political undertakings by eight sovereigns that function as conditions precedent to the enforceability of the private bargain. See O'Leary v. Grace/Newark Hour. Ltd. P'ship., 31 Fed. Appx. 784, 786 (3d Cir. 2002) ("Under basic contract law, a condition precedent is 'an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.'").

(Pl.s' Br. at 51-52).

and

> . . . Viewed *ex post* from May 30, 2001, the date the German Bundestag formally recognized that all conditions precedent had been satisfied no basis whatsoever exists to fail to recognize that the private financial bargain at the core of the Joint Statement is legally binding. Accordingly, given the performance of the conditions precedent set forth in paragraphs 1, 2, 4(b), 4(c) and 4(g), defendants' financial promises in paragraphs 4(a) and 4(d) are contractually binding as a matter of law.

(*Id.* at 58).

In further support of their contention that the financial undertakings recited in Para. 4 of the Joint Statement were intended by the private signatories to be legally binding, Plaintiffs rely on the definitiveness of the language of Para. 4 itself, the intensity

with which the parties negotiated the reciprocal obligations of the parties (to pay a designated sum for complete "legal peace") during a six-month period, multiple declarations of the parties, and the Post-Berlin Agreement activities of the parties, including Defendants' representations to federal judges during proceedings when the parties were seeking dismissal with prejudice of the more than 60 cases pending against Defendants in United States courts.

To support their contention that Para. 4(d) does not constitute a DM 100 million fixed sum, but, rather, requires payment of interest at the rate of 4% per annum from July 17, 2000, Plaintiffs rely in the first instance on what they claim is the unambiguous language of the Joint Statement. They contend that "[c]ourts in both Germany and the United States share a common approach to the construction of a contract. Each begins with the text. An unambiguous text with a 'plain meaning' cannot be altered by extrinsic evidence." (*Id.* at 74-5). Applying this principle, Plaintiffs argue that "[t]he plain meaning of the term 'at least' as connoting a minimum makes it impossible for Defendants to argue persuasively that the term establishes a *ceiling* on interest, as opposed to a floor . . . It is equally impossible to argue that the word 'interest' really means 'additional principal'." (*Id.* at 45). The language of the Joint Statement alone, Plaintiffs urge, entitles them to summary judgment.

B. *Evidence Upon which Gross Plaintiffs Rely*: Were the court to perceive an ambiguity in the meaning

of "at least," however, Plaintiffs contend "the massive extrinsic evidentiary showing by plaintiffs, including Secretary Eizenstat's firm recollection that the terms 'at least' was designed to set an interest floor not a ceiling . . . together with declarations from the principal negotiators for the victims attesting to a similar understanding of the text, renders it impossible to treat the term 'at least' as setting an interest ceiling." (*Id.* at 86).

The extrinsic evidence upon which the Plaintiffs rely is set forth in a number of Declarations. Principal among these are the Declarations of Professor Neuborne, which identify and rely upon a large number of critical documents. In addition, Plaintiffs submit the Declarations of Professor Michael J. Bazyler, Melvyn I. Weiss, Esq., and Secretary Eizenstat. Secretary Eizenstat's Declaration incorporates by reference chapters 10-13 of his book, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003). These chapters describe the negotiations leading to the Berlin Agreements, and the court has relied upon them extensively in formulating the Background section of this opinion.

Professor Burt Neuborne, co-counsel for the *Gross* Plaintiffs, has been a leading champion of the slave and forced labor victims from the start of their pursuit of their claims in United States courts. He was co-counsel in numerous cases seeking recovery. He participated at the invitation of the United States in the complex negotiations with representatives of

GEFI that led to the establishment of the Foundation. He is one of the signatories of the Joint Statement. He is the United States attorney-appointee to the German Foundation Board of Trustees with special responsibility for protecting the interests of victim beneficiaries.

In his Declaration, Professor Neuborne asserts that "representatives of victims believed that the text of the Joint Statement assumed that interest would be earned on the funds constituting the Initiative's DM 5 billion principal obligation: (a) during the deferral period [the period between July 17, 2000 and the date of the initiative's payment to the Foundation]; and (b) subsequent to payment to the Foundation, but before substantial payments could be distributed by the Foundation." (Neuborne Dec. at Para. 79). This would provide the extra funds needed to meet the demands of the various representatives of the victims. It was estimated that the deferral period, the time required to dismiss the United States lawsuits, which would trigger payment by GEFI, would be six months. At a 4% interest rate, interest on DM 5 billion would result in an additional payment of DM $100,000 by GEFI. Because GEFI agreed to pay certain sums into the Foundation immediately upon the signing of the Joint Statement to permit notice and administrative programs to commence, "the parties agreed that DM 100 million interest minimum payable by the Initiative would include interest on both German Foundation funds retained by the Initiative during the deferral period pending transfer

to the Foundation, and funds transferred to the Foundation prior to the expiration of the deferral period." (*Id.* at Para. 84).

According to Professor Neuborne, "[t]he Initiative agreed that the DM 100 million interest guarantee would be payable to the Foundation even if the deferral period, were shorter than the anticipated six months needed for the dismissal of the American cases. But the parties were careful to insert the 'phrase at least' into the interest provision to make it clear that if the deferral period lasted longer than six months, additional appropriate interest would be payable." (Neuborne Dec. at Para. 85, 86).

In a Supplemental Declaration, dated January 18, 2007, Professor Neuborne spelled out in more detail the rationale of the Plaintiffs' position on interest. He states "aided by exhortations from President Clinton and Chancellor Schroeder, on December 17, 1999, the parties firmly agreed to the establishment of DM 10 billion Foundation plus interest, in return for the dismissal with prejudice of all pending litigation and the signing of an Executive Agreement providing protection against future litigation." (Neuborne Supp. Dec. at Para. 16). Because potential claims upon the fund far exceeded DM 10 billion and many classes of victims and distribution agencies were to be recipients of the funds, "the allocation discussions [among representatives of the victims, agencies and nations] were extremely difficult, reaching a potential breaking point in mid-March, 2000." (*Id.* at Para. 17). On March 22, 2000, "with Secretary

Eizenstat's help, the negotiators agreed on a general allocation of DM 8.1 billion to slave and forced laborers; DM 1 billion to property and personal injury claimants; DM 700 million to the Future Fund; and DM 200 million to the administrative costs of operating the Foundation, including the payment of all attorneys' fees. [A total of DM 10 billion]. The formula is set forth in *Appendix B* to the Joint Statement" (Neuborne Supp. Decl. at Para. 20).

Attention then turned to interest and "focused on the likelihood that substantial interest would be earned on the Foundation's DM 10 billion principal during the time needed to dismiss the American cases and to verify and process claims. . . . Estimates of potential earned interest centered on DM 400 million in the first year of the Foundation, premised on a 4% return on the Foundation DM 10 billion principal." (*Id.* at Para. 22).

Para. 4(d) of the Joint Statement was not in existence until after these discussions of the use of various sources of interest to fatten the DM 10 billion available to compensate victims. When the paragraph was agreed to, the representatives viewed "[t]he language of paragraph 4(d) contractually assuring an earned 'interest' floor of 'at least DM 100 million' during the period required to dismiss the United States cases permitted a formal allocation of DM 10.1 billion to be reflected in Annex B to the Joint Statement and the Foundation Law, satisfying concerns of Eastern European countries, the Claims Conference, and prospective insurance claimants." (*Id.* at Para.

23). Further, "the prospect of substantial additional earned interest over and above the DM 100 million guaranteed interest floor was viewed by the negotiators as a crucial hedge against the unavoidable uncertainty surrounding the Neithamer demographic estimates of the number of eligible beneficiaries in various countries, especially surviving slave laborers." (*Id.* at Para. 24).

The negotiators for the victims sought to ensure payment of interest by having the respective DM 5 billion principal obligations of both GEFI and the German government paid into the Foundation prior to dismissal of the United States cases "in order to maximize the earned interest for the victims during the time needed to achieve the dismissal of the cases pending in the United States." (Neuborne Supp. Decl. at Para. 30).

The German government agreed to pay its DM 5 billion debt to the Foundation in two equal installments of DM 2.5 billion each, on October 31 and December 31, 2000. Each installment was paid a month in advance and, once paid, the Foundation commenced earning interest on the funds.

GEFI refused to pay its DM 5 billion until the United States lawsuits were dismissed with prejudice but agreed to pay "interest" of "at least DM 100 million" in addition to the DM 5 billion. Contrary to Defendants' position that the DM 100 million "interest" in Para. 4(d) was a fixed figure, Plaintiffs' position is:

> The negotiators were hopeful that the deferral period needed to secure dismissal of the cases pending in the United States would approximate six months. It was believed that the Panel on Multidistrict Litigation would consolidate the large number of pending cases before a single judge for orderly and expeditious dismissal. The negotiators fully understood, however, that the words "at least" were crucial to assuring that earned interest would continue to accrue during the deferral period if, despite the expectations of the parties, the deferral period extended beyond the estimated six month period.

(*Id.* at Para 33).

In addition to the Declaration of Professor Neuborne, Plaintiffs submitted in support of their position the Declarations of Professor Michael J. Bazyler, Melvyn I. Weiss, Esq., and, most importantly, former Assistant Secretary of State, Stuart E. Eizenstat. Further, Plaintiffs in the *Gross* case relied on the Declaration of Michael Hausfeld, Esq. The substance of that Declaration will be set forth in the summary of the evidence that the *Schwartz Lee* Plaintiffs rely upon.

Professor Bazyler is one of the foremost scholars studying and analyzing the efforts of Holocaust victims to secure redress against private defendants for Nazi-era economic losses. He has written widely on the subject, taught and testified about it. He has conducted vast research in the field, including interviewing

participants in the negotiations culminating in the establishment of the Foundation and reviewing public statements and publicly available papers of these participants.

Professor Bazyler concluded from his research that "[f]rom the beginning of the negotiations on February 8, 1999 through the signing of the Joint Statement in Berlin on July 17, 2000, the paramount aim of the Initiative was to secure: (i) dismissal with prejudice of all WWII-era litigation pending in the United States courts against German industrial defendants; and (ii) protection against future similar litigation, at the lowest possible cost to the defendant industrial corporations that constituted the Initiative." (Bazyler Decl. at Para. 8(c)). He concluded that "[t]he Joint Statement signed by all parties was viewed as a private settlement agreement that would be legally and mutually binding on the Initiative and the class action victims once the Initiative had achieved its goal of 'legal peace.'" (*Id.* at Para. 8(g)).

Concerning the role of interest, Professor Bazyler stated:

> a. Beginning with the November 13, 1999 plenary negotiating session, the negotiators were intensely concerned with the prospect that earned interest could expand the capacity of the German Foundation to provide compensation to victims. Deputy Treasury Secretary Stuart Eizenstat has confirmed in his memoir *Imperfect Justice* (at pg. 254)

that, at the November 13 plenary, he persuaded the Initiative to commit to paying "at least" DM 100 million in "interest" during the period needed to secure the dismissal of cases pending in the United States.

b. The negotiators' concern with earned interest took on greater intensity once the German Foundation's principal was fixed at DM 10 billion at the December 17, 2006 (1999) plenary negotiating session. Since the negotiators for the victims understood that the victims' valid claims on the German Foundation assets could very likely exceed DM 10 billion, the prospect of earned interest was an essential component of the final allocation agreement.

c. It would have been impossible for the negotiators to reach an allocation agreement on March 22, 2000 in the absence of calculations indicating that the Foundation's DM 10 billion principal would be able to earn an additional DM 400 million in its first year under the then-prevailing 4% interest rate. The estimated DM 400 million interest figure included the guaranteed DM 100 million in interest on the Initiative's DM 5 billion obligation payable during the period needed to secure the dismissal of the United States cases, a process that the negotiators believed would take not more than six months.

(Bazyler Decl. at Para. 9).

Professor Bazyler then repeated Professor Neuborne's analysis of the reasoning that resulted in the DM 100 million figure and his rationale supporting the Plaintiffs' position that GEFI's payment of interest at 4% was a continuing obligation until payment of the full DM 5 billion to the Foundation.

Mr. Weiss had served as counsel for the Plaintiffs in numerous cases against German industrial defendants seeking relief in connection with unlawful behavior by German industry during the Nazi era. In February, 1999, he was one of those invited by Secretary Eizenstat to participate in negotiations with GEFI and with representatives of the German government in an effort to resolve the pending litigation in the United States courts. He participated fully in the ensuing negotiations as one of the principal negotiators for the victims.

Mr. Weiss described how, at the first meeting with GEFI, which took place on February 8, 1999, he urged that the pending litigation be settled by negotiating a class action settlement pursuant to Fed. R. Civ. P. 23(e). GEFI firmly rejected the use of Rule 23 and insisted that no funds be paid until all pending World War II era litigation was dismissed with prejudice and adequate protection was provided against future litigation. Eventually agreement was reached on use of the Foundation as the settlement vehicle. Mr. Weiss states that "[s]ince the negotiations were like any other settlement discussions, we insisted that all of the contracting parties sign a binding agreement, resulting in the execution of the Joint

Statement. I was adamant that any document memorializing the final bargain be legally binding. I would never have signed the Joint Statement if I believed that it committed me to dismiss my clients' claims with prejudice in the absence of any legally binding obligation on the part of the Initiative." (Weiss Decl. Para. 8).

With respect to interest on the DM 10 billion, Mr. Weiss states, "[i]n connection with those negotiations, the parties discussed the prospect that the Foundation's DM 10 billion would earn substantial interest at market rates during the period needed to dismiss cases pending in the United States and process the victims' claims. Since the prevailing German market rate was 4% in 2000, the negotiators anticipated that the Foundation would earn DM 400 million on its DM 10 billion principal during its first year of operation." (*Id.* at Para. 11).

Mr. Weiss described the attempts of the victims' negotiators to prevail upon the German government and GEFI to place their respective DM 5 billion obligations into the Foundation prior to dismissal of the actions pending in the United States "so that the funds could begin earning interest for the victims." (*Id.* at Para. 13). The German Government agreed to pay its share on October 31 and December 31, 2000, but GEFI insisted upon waiting until dismissal with prejudice of the United States cases. With respect to the DM 100 million "interest" payment GEFI agreed to pay, Mr. Weiss stated:

Thus, the parties assumed that within approximately six months of the execution of the Joint Statement, the Initiative would place its DM 5 billion obligation into the foundation, together with a guaranteed "interest" payment of "at least" DM 100 million" accrued during the deferral period. The Foundation would then consolidate the combined total of DM 5.1 billion with the German government funds already in the Foundation, plus the interest that had accrued on those funds, and so that all of the funds held by the Foundation would earn interest for the victims at 4% during the period needed to process claims.

In order to assure that the DM 5 billion obligation would earn uninterrupted interest for the victims during any unexpected prolongation of the deferral period, negotiators for the victims, with the support of the United States, insisted that the term "at least" modify the guaranteed figure of DM 100 million. It was clear to me that the promise to pay "at least" DM 100 million in "interest" during the deferral period established a DM 100 million floor on interest, not a ceiling. I would not have agreed to such a ceiling because it would have created a substantial risk of a "dead" period during which the Initiative's DM 5 billion principal obligation would have ceased to earn interest for victims, thereby undermining the carefully

> negotiated allocation agreement which assumed the uninterrupted flow of earned interest.

(*Id.* at Para. 16, 17).

Secretary Eizenstat, along with his German counterpart, Count Lambsdorff, played a momentous role in bringing the governments, parties, and other agencies to agreement. During the period 1993-2000 he had served as United States Ambassador to the European Union, Assistant Secretary of Commerce, Assistant Secretary of State, and Deputy Secretary of the Treasury. With that vast range of experience he was well suited to serve as President Clinton's Special Envoy for Holocaust Restitution. He proved to be a zealous negotiator and advocate for the victims during the period when the Berlin Agreements were being forged. Despite his pursuit of maximum compensation for the victims, all parties to the negotiations trusted Secretary Eizenstat totally. He described the negotiations in chapters 10-13 of *Imperfect Justice*. In his Declaration, submitted in support of Plaintiffs' position in this case, Secretary Eizenstat reaffirms the description of the negotiations set forth in *Imperfect Justice*.

In the present case, Professor Neuborne relies upon Secretary Eizenstat's book, stating, not in his Declaration, but in Plaintiffs' Brief (at 19-20):

> At the November 13 plenary, Secretary Eizenstat, seeking to narrow the gap [concerning the size of the fund] raised the

issue of interest for the first time. In his words:

> "I then engaged in what I could only call creative accounting. I persuaded Lambsdorff and Gentz [the Initiative's chief negotiator] to add the interest that would be earned on the money while we were getting the cases dismissed and setting up the Foundation . . . They ended up agreeing to pay *at least* 100 million in interest."[3]

In a footnote to this quotation, Plaintiffs add, "[t]hus, the agreement to pay interest during any deferral period was in place on December 17, 1999." (Pl.s' Br. at 19-20).

Nowhere in his one and one-half page Declaration does Secretary Eizenstat state that "the agreement to pay interest during any deferral period was in place on December 17, 1999." Rather, he states:

> It is my firm recollection that sentence 7 of paragraph 4(d) of the Joint Statement of Principles, which reads:
>
> > German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the

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[3] This quotation from *Imperfect Justice* is taken totally out of context, a subject that will be dealt with more extensively in subsequent sections of this opinion.

> Foundation will reach at least 100 million DM.

was intended to establish a minimum interest figure payable to the Foundation in connection with the deferral during the period needed to attain "legal peace" of the German Foundation Industrial Initiative's obligation to pay DM 5 billion to the Foundation. The language, which was carefully negotiated, was not intended to establish an interest ceiling, or to describe an addition to principal. It was a highly contentious matter in negotiations and the understanding was carefully negotiated.

The foregoing is a summary of the *Gross* Plaintiffs' contentions and of the evidence that they contend entitles them to summary judgment.

V. Schwartz Lee Summary Judgment Motion

A. *Schwartz Lee Plaintiffs' Contentions*: Plaintiffs, Bernard and Barbara Schwartz Lee, allege that not only were they compelled to perform slave labor for German industry during World War II but also that they lost extensive family property and assets to Aryanizations by Defendants, Deutsche Bank and Dresdner Bank. The backdrop of the complaint is the same as that of the *Gross* complaint – the international talks that led to the Berlin Agreements and the creation of the Foundation. The Complaint asserts

two causes of action – one for breach of contract and the other for fraudulent misrepresentation[4].

The breach of contract claim starts with the undisputed allegation that in December, 1999, the German Government and German industry agreed that they would pay DM 10 billion to the Foundation for compensating victims. The consideration for this payment was resolution of existing and avoidance of future lawsuits in United States courts against German companies for wrongs arising during the Nazi-era. The dispute among the parties arises from Plaintiffs' claim that in December, 1999, the German Initiative agreed to pay interest on the promised funds.

Plaintiffs allege that in December, 1999, an agreement was reached requiring the German Government and German industry to contribute DM 10

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[4] Plaintiffs do not seek summary judgment on their fraudulent misrepresentation claim, although that claim is a subject of Defendants' motion to dismiss. This claim rests on the allegations of Para. 86 of the complaint:

> Defendants and/or the German Industry Initiative [sic] made numerous representations of fact, including the representations that funds were being collected on schedule, interest would accrue on the DM 10 billion present value as of December 1999, and payment in full had timely occurred, among others. Defendants and/or the German Industry Initiative made these representations to induce Plaintiffs to act and/or refrain from acting and knew or should have known that these representations were false. Plaintiffs justifiably relied on these representations.

billion to the Foundation "to terminate litigation pending in American courts against German defendants." (Compl. Para. 23-32). Plaintiffs further allege that in early December, 1999, the Germans made an offer of DM 8 billion, which Plaintiffs rejected. (*Id.* at Para 23). On December 13, 1999, the Complaint alleges, Mr. Hausfeld wrote to Count Lambsdorff extending a counteroffer with the language, "[t]he German side agrees to a 10 billion DM present value settlement, excluding costs of administration, distribution, notice, and fees . . . " (*Id.*, at Para. 24). The Complaint alleges that Secretary Eizenstat responded the next day by informing Mr. Hausfeld in a phone call that "[t]he Germans have accepted. You have a deal." (*Id.*, at Para. 26). Plaintiffs claim that this interchange constituted the Agreement and that the Agreement committed the German companies to provide the Foundation with all interest earned on their DM 5 billion contribution as of December, 1999. (*Id.* at Para. 3, p.83-86).

It is the Plaintiffs' contention that the July 17 Joint Statement confirmed the Agreement reached in December, 1999, and provided for the timing of the payments and other steps to be taken by the signatories to the Joint Statement. Anticipated interest was the source of funds needed to satisfy the demands of all those representing victims. Unless the demands were satisfied they would not have signed the Joint Statement which permitted the settlement to proceed.

Plaintiffs allege that legal peace was achieved on May 30, 2001, when the German Bundestag issued a Resolution declaring that "legal peace" had been achieved, thus triggering German industry's obligations under Para. 4(d) of the Joint Statement. According to the Complaint, not only did German companies fail to remit to the Foundation the DM 5.1 billion they admitted they owed, they failed to pay over, or even acknowledge that they owed, interest in excess of DM 100 million on assets they had held for the Foundation.

Plaintiffs' legal arguments parallel those of the *Gross* Plaintiffs. Their specific claims against Defendants are:

i) Defendants paid only DM 3.9 billion in principal immediately upon the achievement of legal peace, not completing payment of principal until at least 2002.

ii) Defendants' use on account of their principal obligation of a) interest on amounts collected for ultimate distribution to the Foundation and b) interest on the 8,500 contributions (See *Schwartz Lee* Memo in Support of Motion for Partial Summary Judgment at p.31 for this figure) by generous parties for ultimate distribution to this Foundation was improper.

iii) Defendants have failed to pay all interest earned on the principal collected for the Foundation.

Plaintiffs note that "[w]hether Defendants owe interest dating back to the date of the oral agreement, December 17, 1999, or only to the date of the Joint Statement, July 17, 2002, cannot be resolved on summary judgment prior to discovery. Plaintiffs are moving solely for summary judgment on the fact that, irrespective of which date interest began to accrue, Defendants have failed to pay that interest to the Foundation." (*Id.* at 33).

B. *Evidence Upon which Schwartz Lee Plaintiffs Rely*: In support of their motion for partial summary judgment the *Schwartz Lee* Plaintiffs rely upon the Declaration of Michael D. Hausfeld, Esq., and documents accompanying the Declaration created during, or describing, the negotiations of the Berlin Agreements. The following portions of this opinion summarize Mr. Hausfeld's Declaration and draw upon the documents he relies upon.

Mr. Hausfeld played a leading and critical role in the process that led to these Agreements. He served as counsel in a number of cases raising claims against German industry for its use of forced and slave labor during the Nazi era. He served as counsel for those Plaintiffs in negotiations to resolve the claims. He advised the Central and East European nations and their survivor associations that participated in the negotiations in order to support the claims of their nationals, who made up the largest proportion of forced and slave laborers.

In early October, 1998, Martin Mendelsohn, Esq., and Mr. Hausfeld approached Secretary Eizenstat, then Under Secretary of State for Economic, Business, and Agricultural Affairs, with a detailed proposal for resolving the lawsuits through an international conference that would bring together the private sector and the German government, combining funds for global resolution. (Hausfeld Decl. at Para. 13). The proposal contemplated negotiations in three separate areas – Slave/Forced Labor, Banking, and Insurance – and that the agreed upon settlement fund would be under United States court supervision. (*Id.* at Exh. 4). Secretary Eizenstat reacted positively to the approaches of the Plaintiffs' attorneys to him. He advised President Clinton, Vice President Gore, and Secretary Albright of the suggestion and communicated with the German government. He arranged with Minister Holmbach for a second meeting with Plaintiffs' attorneys in Germany. (*Id.* at Exh. 6).

In October, 1998, Gerhard Schroeder was Chancellor-elect of Germany. His predecessor, Helmut Kohl, had rejected proposals for a Government fund to compensate forced/slave laborers, contending that the German Government had already paid out tens of billions of dollars in various forms of compensation for Holocaust victims and did not want to pay more. Representatives of German industry approached Chancellor-elect Schroeder urging that, in light of the serous direct and indirect consequences of the lawsuits upon German industry, the Government should

take a lead in creating a fund to compensate former workers to which the industry representatives volunteered to contribute. (*Id.* at Exh. 7).

In February, 1999, Mr. Hausfeld met with Germany's Minister of the German Chancellory, Bodo Holmbach, and Secretary Eizenstat for initial discussions. (Hausfeld Decl. at Para. 16), and a February 17, 1999, New York Times article announced that "Chancellor Gerhard Schroeder today announced establishment of a fund, projected to amount to $1.7 billion financed by 12 German companies, to compensate victims of the Nazis era and end what he called 'the campaign being led against German industry and our country.'" (*Id.* at Exh. 9).

On May 11 and 12, 1999, the United States Department of State hosted the first plenary session to explore the possibility of settling the litigation against German companies. Further plenary sessions took place in Bonn and Washington from June 22, 1999, through July 17, 2000 (*Id.* at Para. 19, 20). The plenary sessions were attended by Plaintiffs' counsel; representatives of German industry; representatives of the governments of Belarus, the Czech Republic, Israel, Poland, Russia, and Ukraine; representatives of the Central and East European Reconciliation Foundations; officials of the Government of the Federal Republic of German; officials of the United States Government; and representatives from the Conference on Jewish Material Claims Against Germany. (*Id.* at Para. 21). Secretary Eizenstat, on behalf of the United States, and Bodo Holmbach, on

behalf of Germany, chaired the negotiations. Later, Count Otto Lambsdorff replaced Mr. Holmbach. (*Id.* at Para. 22).

During the plenary sessions and during working sessions dealing with specific problems, the participants had to address numerous complex issues such as the amounts of German Government and industry contributions, the categories of victims who would share in the fund, the method of terminating the lawsuits in the United States, how to ensure that German industry would have "legal peace," i.e., not be subjected to future lawsuits, how the fund would be operated, establishment of a "future fund" for humanitarian and Holocaust-related projects, and dealing with issues of banks, Aryanized property, and insurance.

At the June 22, 1999 plenary session, among the agreed positions was:

> The participants were unanimous that the call of the participating companies and the German government for a final and comprehensive legal settlement as a prerequisite for their financial commitment was legitimate. They should not be asked to pay twice. As concerns the class actions in the USA, the search for a third way should be accelerated, since the US Government has rejected the idea of an Executive Agreement excluding law suits, and the companies do not want to accept a settlement in court. Under Secretary Eizenstat appealed to the creativity of

> the plaintiffs' lawyers, who likewise accept the desirability of legal closure.

(Hausfeld Decl. at Exh. 19).

On June 30, 1999, Roger M. Witten, Esq., counsel for GEFI, submitted to Secretary Eizenstat a "Third Way" designed to assure the German companies that they would be protected from future litigation.

> The essence of our proposal is that, simultaneous with the achievement of consensus on the structure, operation, and funding of the Foundation Initiative, the U.S. Government would commit itself in a bilateral executive agreement with Germany to seek dismissal of all current and any future lawsuits in view of the establishment of the Economy Foundation. The executive agreement would require the United States to fulfill this commitment by filing a Statement of Interest in each court where a current or future case is pending. That Statement of Interest would urge the court to dismiss – not on the ground that the executive agreement legally binds the court to dismiss under the *Dames & Moore* line of cases, but rather on the ground that the court should dismiss for the reasons set forth in the Statement. With respect to the currently pending cases, the United States would file this Statement of Interest in a context in which the participating parties had achieved consensus on the Foundation Initiative and, on that basis, would simultaneously ask the court to dismiss.

(*Id.* at Exh. 20, p. 1-2). The Legal Closure Working Group concluded that the Witten proposal was a viable option.

Mr. Hausfeld hired economists to put together a framework for determining the total number of foreign forced laborers and to estimate the economic value of the forced labor (Hausfeld Decl. at Para. 42-44). During August, 1999, Mr. Hausfeld and Dr. Manfred Gentz, who represented German industry, exchanged correspondence in which they disagreed about a number of points and in which Mr. Hausfeld expressed exasperation about the pace of negotiations. (*Id.* at Exh. 27, 28).

In September, 1999, the participants in the negotiations sought resolution of the amount that would be paid into the fund. On September 13, 1999, Chancellor Schroeder wrote to President Clinton, agreeing that "this Initiative is an extremely important project concerning a matter of unique moral and human significance" but observing that "the conclusion of pending civil actions, as well as the prevention of future actions based on new facts in connection with the Nazi era are, in view of the German Government, further imperative prerequisites for the success of the Initiative." (*Id.* at Exh. 33).

A memorandum to the President, cleared by Secretary Eizenstat, addressed a number of subjects, but got to the heart of the matter – money:

> Deputy Secretary Eizenstat told Count Lambsdorff in late august that the German

government and companies would need to provide the proposed German foundation with a combined contribution of 10 billion D-marks ($5.5 billion). We would need this amount so that we could argue publicly and in court that the German offer is a fair settlement. That amount is also critical because the Germans have also insisted on a settlement which would cover all injuries from World War II related to German companies: not only forced/slave labor cases, but bank cases involving the aryanization of property, insurance cases, and other matters, e.g., medical experimentation.

Our information is that the Germans may propose in this week's round of talks an amount that will be no more than 6 billion D-marks. German industry would provide only 4 billion D-marks and the German government would provide only 2 billion. The German companies are disappointed that their government will fail to match fully their offer, as they had expected. Schroeder's budget constraint is a factor. The expected low German offer is probably also based on the assumption that they have no legal liability and that Poland and the Czech Republic will not wish to create a public political dispute with Germany at this time. However, this position fails to take into account a negative public reaction if the offer is too low, and also fails to recognize that class action lawyers will be unwilling to settle for this amount. Moreover, there is a prospect that the judges

> erred and the lower court rulings will be reversed on appeal.
>
> We recommend that you praise the Chancellor for this leadership in this matter and argue for an opening German offer closer to 10 billion D-Marks, with an eventual willingness to go up to this level if necessary. We believe that an eventual settlement will not be possible if it is much below 10 billion D-Marks.

(Hausfeld Decl. at Exh. 34, p.4-5).

At a Fifth Plenary session held on October 7, 1999, the German side offered a total of DM 6 billion to resolve the lawsuits, which the Plaintiffs rejected (*Id.* at Para. 55, 56). Mr. Hausfeld engaged in discussions with Count Lamsdorff after he received an October 29, 1999, letter from Dr. Gentz. Dr. Gentz reported that Count Lambsdorff "is striving hard and not always to the applause of other German participants to bring the German offer closer to a point where he feels everybody should be, as Graf Lambsdorff puts it, 'mildly dissatisfied.' I have to assure you, however, that the figure he has in mind is nowhere near the 12 billion dollars you proposed and is not even 10 billion marks as ventilated elsewhere." He added, "I think we also agree that there is no alternative to investing the Reconciliation foundations and similar organization with the execution of payment." (*Id.* at Exh. 37).

On November 4, 1999, Reuters reported that mediators Eizenstat and Lambsdorff were to meet in

Washington in "troubled talks on compensation." (*Id.* at Exh. 38). On December 1, 1999, Count Lambsdorff wrote to Mr. Hausfeld stating that "[t]he German side agreed to a foundation capital of 8 billion DM," of which German industry was to pay DM 5 billion and the German government was to pay DM 3 billion (*Id.*, Para 61, 62, Exh. 40).

Secretary Eizenstat communicated with Central and East European governments and urged them to accept a settlement of DM 8 billion. The Government of Poland on behalf of the group refused. (Hausfeld Decl. at Para. 63). Mr. Hausfeld, on December 2, 1999, wrote to Count Lambsdorff rejecting the offer of the German side and stating Plaintiffs' counsel "were told that you had a negotiating range between 6 and 10 billion DM. We responded that we were prepared to negotiate between 10 and 15 billion DM." (*Id.* at Para. 64, Exh. 41).

In early December, 1999, Secretary Eizenstat urged the European delegations to accept the German offer, rather than hold out for the higher amounts sought by Plaintiffs' lawyers. (*Id.* at Para. 66).

The Department of State sent two faxes to the Embassies of Poland and Belarus. The first included the following:

> As Deputy Secretary Eizenstat made clear to your delegation in Bonn at the conclusion of the Nov. 16-17 negotiating round, enormous progress has been made. All of the elements are in place for a settlement,

> except agreement on the total funding level of the German Foundation that will pay former forced and slave laborers, and the allocation of funds among beneficiary groups and companies.
>
> Since Bonn, Deputy Secretary Eizenstat has been focusing his attention on ways in which to bridge the remaining gap between what the German side is offering, DM 8 billion (DM 5 billion from German Industry and DM 3 billion from the German government), and what the Class Action Plaintiffs' lawyers demanded in Bonn, a settlement of between DM 10 and DM 15 billion.
>
> While how the money will be allocated between classes of beneficiaries and among countries remains a critically important issue to be resolved – and one on which Eizenstat has, and will continue to want to consult closely with your government – the focus now must be on negotiating a final capped amount, and to do so before the offer from German Industry expires on December 8.

(*Id.* at Exh. 43).

The second fax that the State Department sent to the two Embassies contained substantially the same admonitions as the first. With success so close, "the focus must be on negotiating a final capped amount," and Secretary Eizenstat "has instructed me to say that you have his personal assurance that once a capped amount for the German Foundation is agreed, he will accelerate his efforts to work-out a

just distribution of those funds, both among classes of beneficiaries and participating countries." (Hausfeld Decl. at Exh. 44).

A December 13, 1999, letter to Count Lambsdorff is at the heart of the claim that interest is owing on DM 10 billion from December 14 or 17, 1999. The letter was signed by Mr. Hausfeld, several other attorneys, and on behalf of the Republic of Poland, the Czech Republic, the Republic of Belarus, and Ukraine. It read in its entirety:

> At this point there must be no misunderstanding. The undersigned counsel, the governmental delegations, individuals and organizations they represent, have extended an offer to resolve the issues which have been the subject of the international conference on German offenses on the following terms.
>
> 1. The German side agrees to a 10 billion DM present value settlement, excluding costs of administration, distribution, notice and fees.
>
> 2. That there be firm commitment from non-German firms which used forced labor during World War II in an amount no less than 1 billion DM. (This would be a parallel mirror fund to be added to the 10 billion DM German commitment).
>
> 3. That reasonable administrative, distribution, notice costs and fees be paid by the German side over and above the 10 plus 1

> billion DM commitment from German and non-German companies using forced labor during World War II.
>
> 4. That the German and non-German companies using forced labor commit to having their documents publicly archived at a reasonable expense to be determined in an appropriate historical repository.

(*Id.* at Exh. 49).

On December 13, 1999, President Clinton wrote to Chancellor Schroeder. He reported to the Chancellor that "Deputy Secretary Eizenstat was intensively engaged this past week with the plaintiffs' attorneys with whom he has dealt to move them closer to the German offer. On Sunday, he reported to Count Lambsdorff that they, the Conference for Jewish Material Claims Against Germany, the Central and Eastern European Governments, and the Government of Israel would agree to settle at DM 10 billion. . . . This counteroffer is a firm commitment for settlement of which we both could be proud. . . ." President Clinton also described the mechanism for ensuring legal peace for the German companies (Hausfeld Decl. at Exh. 50).

In his Declaration Mr. Hausfeld states, "[t]he following day, December 14, 1999, Deputy Secretary Stuart Eizenstat telephoned me and told me that the German government and German Industry had accepted the December 13, 1999 offer. Mr. Eizenstat

told me: 'Congratulations. The Germans have accepted. You have a deal.'" (*Id.* at Para. 76).

Most curiously, Mr. Hausfeld's Declaration next refers to, and provides a copy of, an April 3, 2000, letter from a Special Assistant to the President informing Mr. Hausfeld that the December, 1999, exchange of letters between President Clinton and Chancellor Schroeder concerning the amount of the German payment to the Foundation did not constitute "an international agreement or a statement of the existence of an international agreement. Rather, it is a political exchange discussing issues to be resolved by ongoing negotiations." (*Id.* at Para. 77, Exh. 51). President Schroeder's December 14, 1999, letter is available. It is highly relevant to the issue of the validity of the claim that interest is owing on the DM 10 billion from December 14 or 17, 1999. It is extraordinary that Mr. Hausfeld did not include it in his Declaration. It will be the subject of further discussion.

After agreement on the DM 10 billion figure was reached, President Clinton, Secretary Albright and Secretary Eizenstat made appropriate remarks. (Hausfeld Decl. at Exh. 52, 54). Secretary Eizenstat's December 17, 1999, statement at the Berlin Plenary Session included the following:

> I am very pleased the German enterprises and the Government of the Federal Republic have agreed to raise their combined contribution to the Fund for Remembrance, Reconciliation and the Future to DM 10 billion . . .

[The other parties to the negotiations] have accepted DM 10 billion as the capped amount for the foundation and the sum that will resolve the lawsuits in the U.S. Courts.

We have for the first time on a capped amount – a ceiling – to resolve the lawsuits against German companies and to make dignified payments to former public and private sector Nazi-era slave and forced laborers and all those who suffered at the hands of German companies during this period.

. . .

In addition as a result of negotiations yesterday, all participants have agreed to use interest earned on contributions to the Foundation for the furtherance of the purposes of the Foundation.

This agreement is the keystone in the arch of this long and difficult negotiation. We shall now proceed to conclude matters necessary to implement the overall agreement so that payments can begin to be made as soon as possible. These include reaching agreement on the allocation of the DM 10 billion among the various categories under the German Foundation, and the relationship of insurance matters between the Foundation and the International Commission on Holocaust Era Insurance Claims chaired by former Secretary of Larry Eagleburger.

. . .

> We will act to resolve all of the outstanding issues as expeditiously as possible. But it is important not to raise unrealistic expectations on the timing of payments. It will take some time to implement the details of an agreement, to have lawsuits dismissed, to have the German Bundestag enact the necessary legislation; to have the German economy raise their share of the DM 10 billion, to provide notice to the potential recipients; and to file, process, and pay claims. Consequently, it may take up to a year before dignified payments can be made, although we will do all we can to shorten this time period.

(*Id.* at Exh. 54).

A December 17, 1999, GEFI press release welcomed the agreement and stated that "[t]he DM 10 billion includes all associated costs of administration, legal fees and other expenses, and will not be increased in the future." (Hausfeld Decl. at Exh. 55). A January 11, 2000, Agence Press release reported that "[t]he spokesman for German industry in the matter, Wolfgang Gibowski, said last week that German industry was still far from having reached its pledged goal of collecting five billion marks. By Christmas, only 75 firms accounting for two billion marks had been gathered. However, Gibowski was optimistic the promised sum could be reached by summer. He said two or three more firms a day were now joining." (*Id.* at Exh. 57).

Count Lambsdorff's February 9, 2000, testimony before the Committee on Banking and Financial Services of the United States House of Representatives gave a detailed summary of the status of negotiations as of December 17, 1999, the agreements that had been reached as of that date, proposals for allocating the DM 10 billion, and steps that remained to be taken (*Id.* at Exh. 58). He cited the exchange of letters dated December 13 and 14, 1999, between President Clinton and Chancellor Schroeder and verbal confirmation of the agreement between the heads of state on December 17 in the presence of Secretary Albright, German Foreign Minister Fischer, delegations from Israel, Belarus, the Czech Republic, Poland, Russia and Ukraine, as well the Claims Conference and groups of American plaintiffs' lawyers. Count Lambsdorff reported that " . . . a capped capital of 10 billion marks has been established for the Foundation" (*Id.* at Exh. 58, p. 3), adding, " . . . believe me, I wish I had greater funds available for distribution, but 10 billion marks is what we got and what was agreed upon by all of the participating parties after long and arduous negotiations." (*Id.* at Exh. 58, p. 5).

Count Lambsdorff stated that "[t]ogether with my respected colleague Stuart Eizenstat, I shall continue over the next few weeks to try to arrive at solutions regarding allocation." (*Id.*). He proposed an allocation of the DM 10 billion which was not meant to be binding, but was to be the subject of future

negotiation among the victims and their representatives:

> *DM 7.7 billion* – victims of slave and forced labor as well as victims of certain other personal injuries, medial tests, Kinderheim cases.
>
> *DM 1 billion* – property claims, including insurance and bank issues.
>
> *DM 1 billion* – a Future Fund to preserve the values and fund projects that will advance the values of the Foundation.
>
> *DM 300 million* – for administration costs, including lawyers' fees.

Hausfeld Decl. at Exh. 58, p. 4, 4, 5.

Speaking before the Committee on Domestic Affairs of the German Bundestag on February 16, 2000, Secretary Eizenstat urged adoption of the legislation needed to implement the Foundation project. He, like Count Lambsdorff, described the December 17, 1999 agreement of the German government's and the German companies' "commitment to contribute a total of DM 10 billion to the Foundation." (*Id.* at Exh. 59, p. 1). He noted that "[b]efore I begin discussing the legislation, however, I want to note that the DM 10 billion capped amount has been agreed to by all of the participants and nothing I will say would increase the obligation of either the German Government or German companies by one pfennig or reopen any issues closed over the years since the end of World War II." (*Id.* at Exh. 59, p. 2).

Secretary Eizenstat referred to one of the "seminal elements" of this process, "that in return for their participation in funding a German Foundation, [the German companies] receive legal peace in U.S. Courts from pending and future law suits arising out of the Nazi era." (*Id.*). Secretary Eizenstat discussed at length the complex problem of allocating the funds among victims and victim groups, a problem yet to be resolved. Secretary Eizenstat advanced an observation on the subject of interest, a matter that was not the subject of the December 17, 1999, announcement and, in fact, conflicted with the agreement that administrative costs and attorneys' fees would be paid from the DM 10 billion. This note was to the effect: " . . . it is critically important that the German companies deposit their DM 5 billion contribution as soon as possible in an interest bearing account. The interest should support the purpose of the Foundation and would be the source used to pay administrative expenses and negotiated legal fees." (Hausfeld Decl. at Exh. 59, p. 9). Secretary Eizenstat repeated these remarks at a press conference held the same day and referred to the negotiations concerning the allocation of the DM 100 billion, stating "[t]hrough our discussions, we were able to further narrow our differences so that we are now within striking distances of an agreement on allocation." (*Id.* at Exh. 60).

During the next few months talks proceeded on how the DM 10 billion should be allocated among the victims. The negotiations were very difficult and,

according to Mr. Hausfeld, "were resolved only when the expected interest on the principal was factored in." (*Id.* at Para. 89, 91).

On March 23, 2000, Secretary Eizenstat reported to the 11th Plenary Meeting a "consensus agreement" on the allocation of the DM 10 billion in the German Foundation to which all parties agreed. He stated that "Count Lambsdorff and I met with each group of participants. All vigorously defended their positions, but all recognized the larger imperative of reaching agreement now so that funds could promptly go to survivors. Count Lambsdorff and I introduced a joint proposal that sought to meet the basic needs of each participant. (*Id.* at Exh. 62, p. 1). It is difficult to reconcile all the figures Secretary Eizenstat sets forth so as to arrive at DM 10 billion or DM 10 billion with an additional DM 50 million in interest, but the report stated that "[t]here will be DM 8.1 billion allocated to make payments to surviving slave forced laborers and to others for other personal injuries. The German Foundation will allocate the DM 8.1 billion from within the DM 10 billion to labor. The DM 8.1 billion will be increased by anticipated interest earnings of DM 50 million, for a total of DM 8.150. We also hope there will be a contribution from the Swiss settlement to the Foundation." (*Hausfeld Decl. at Exh. 62, p. 1*).

When reporting on negotiations to the Senate Foreign Relations Committee on April 5, 2000, Secretary Eizenstat recited an allocation summary that accounted for the full DM 10 billion:

DM 8.1 billion – slave forced laborer and others for personal injuries

DM 1.0 billion – property claims, insurance claims, property and insurance humanitarian funds

DM .7 billion – Future Fund

DM .2 billion – Administration of Foundation

DM 10.00 billion – Total

Secretary Eizenstat stated that there would be added to the DM 8.1 billion, "50 million in anticipated interest earnings." When recounting the individual payouts to the nations handling payments to their citizens, Secretary Eizenstat included "an amount of estimated earned interest." (*Id.* at Exh. 63, p. 2-3). As in past reports, Secretary Eizenstat stated, "All the parties to these negotiations accepted the 10 billion DM offer as the capped amount for the German Foundation and the sum that will resolve the lawsuits." (*Id.* at Exh. 63, p. 2).

On July 17, 2000, the Joint Statement was signed by Plaintiffs' attorneys, a representative of German industry, and the Governments of Germany, the United States, Belarus, the Czech Republic, Israel, Poland, the Russian Federation, and Ukraine. (Hausfeld Decl. at Para. 97). As to his understanding when he signed the Joint Statement as one of the attorneys for the Plaintiffs, Mr. Hausfeld states:

> I signed the Joint Statement. I believed at the time and I believe now that the commitments made in December 1999 and in the Joint Statement were binding agreements that were legally enforceably in a court of law in the United States.
>
> Based on the history of the negotiations, it was clear that interest was expected to accrue on the funds, and would ultimately exceed DM 100 million. The term "at least" DM 100 million in the Joint Statement was not meant to be a ceiling.
>
> I would not have advised my clients to sign the arguments or to dismiss their claims if I believed it was unenforceable.

(*Id.* at Para. 98-100).

Mr. Hausfeld refers to a July 17, 2000, Declaration of the Central and Eastern European States that includes criticism of the negotiating process, makes several demands upon the Kuratorium of the Foundation, including:

> that the Kuratorium supports the proposal that interest earned above 100 million DM, which is included in Annex B Distribution Plan to the Joint Statement, be used for direct payments to victims of slave and forced labor in Central and Eastern Europe and be allocated to partner organizations in Central and Eastern Europe according to the proportions adopted in that Annex.

(*Id.* at Exh. 66, para. 3(j), p. 2).

At the 12th and Concluding Plenary on the German Foundation held in Berlin on July 17, 2000, on the occasion of the Joint Statement, Secretary Eizenstat recited the terrible history, ignored for 55 years, that led to the negotiations resulting in the agreement reached that day. He described the negotiations themselves and the roles played by the various participants. In one place he referred to "the capped 10 billion DM – plus interest fund." (*Id.* at Exh. 68, p. 3). He added, "We all expect this money to be provided as soon as possible in an interest-bearing account so that any delay in settlement and dismissal of cases will not further disadvantage aging victims." (Hausfeld Decl. at Exh. 68, p. 5).

A March 13, 2001, GEFI report announced that "[a]s of today the German Industry Foundation Initiative has raised the full required amount of 5 billion marks. In a large-scale campaign of letters and telephone calls the Foundation Initiative is calling on its members, now numbering around 6000 to increase their previous pledges. Non-members are also being approached and encouraged to join. The campaign is still underway . . . As soon as sufficient legal security has been achieved for German Companies in the United States, and that should be the case very soon, it will be possible to start making compensation payments to surviving forced laborers who were victims of the Nazi regime." (*Id.* at Exh. 76).

On March 20, 2001, Judge Kram denied the motion to reconsider her March 7, 2001, order denying plaintiffs' motion to dismiss the Consolidated

Class Action Complaint. (*Id.* at Exh. 77). A May 22, 2001, German Industry Press release announced the May 17, 2001, Court of Appeals declaration that the conditions that Judge Kram imposed on the May 10 dismissal of ten consolidated class actions were inadmissible and ordered dismissal of the cases. Judge Kram complied with the Court of Appeals order the next day. On May 22, 2001, the companies that had started GEFI declared that in light of these developments a sufficient level of legal security had been achieved. (*Id.* at Exh. 78).

On May 30, 2001, the German Bundestag determined "that adequate legal security has been established pursuant to Section 17, Para. 2 of the Law on the Creation of a Foundation 'Remembrance, Responsibility, and the Future.'" The Bundestag determination continued:

> The German Bundestag takes note of the fact that the Foundation Initiative, according to number 4d of the "Joint Declaration" of July 17, 2000, will pay the contribution of the German enterprises in the amount of DM 5 billion plus at least DM 100 million to the Foundation "Remembrance, Responsibility, and the Future." The German Bundestag understands that these funds will be transferred immediately to the Foundation "Remembrance, Responsibility, and the Future."

(Hausfeld Decl. at Exh. 80, p. 2).

On June 11, 2001, a GEFI press release announced that "[l]ast week the . . . Initiative transferred the money accumulated in its accounts, in the amount of DM 3.9 billion, to the federal foundation. Accrued interest in the amount of DM 100 million will be transferred this week. The other sums of money, for which binding pledges were given, will also be made available to the federal foundation in the near future." (*Id.* at Exh. 83).

On September 5 and 12, 2001, Mr. Hausfeld wrote to Ambassador Dieter Kastrup, Chairman of the Foundation challenging on many grounds whether the Foundation had been fully funded by the German Government and German industry and claiming that funds in addition to the DM 10.1 billion belonged to the Foundation. (*Id.* at Exh. 84, 85). It is unnecessary to detail all of Mr. Hausfeld's claims, as those that survive are the subject of the present law suits.

In an October 5, 2001, press release the GEFI announced that on that date it had transferred just under DM 550 million to the Foundation, asserting that "[w]ith this payment, the financial obligation for German industry, as laid down in the law creating the foundation . . . i.e. to pay the amount of DM 5 billion has been complied with in full. In addition, the German Industry Foundation Initiative has transferred DM 100 million in accrued interest to the Foundation." (*Id.* at Exh. 87).

On March 22, 2002, Mr. Manfred Gentz, GEFI's representative, wrote to Ambassador Kastrup, setting forth GEFI's response to the contentions that it had not fulfilled all of its obligations towards the Foundation, noting that the Foundation's Board of Directors and Federal Ministry of Finance agreed that GEFI had complied in full with its obligations. (Hausfeld Decl. at Exh. 89). It is unnecessary to provide a full summary of this communication, because the contentions sets forth are fully explored in the present action.

VI. Defendants' Motions

A. *Defendants' Motion to Dismiss Both Complaints*: The Defendants in the *Gross* and *Schwartz Lee* cases cross-move to dismiss the complaints in accordance with Fed. R. Civ. P. 12(b)(6) on the grounds that i) neither the Joint Statement, nor any part of it, is enforceable as a private contract, but rather is a political document, leaving its participants to their remedies in Germany through the Foundation and the German Ministry of Finance, or through U.S.-German diplomacy, and ii) even if construed as a contract, the Joint Statement did not obligate GEFI or the present Defendants to pay any specific amount themselves, did not require that the German company funds earn more than DM 100 million in interest, and did not require that any particular fraction of this amount be earned before, rather than after, German company funds were transferred to the Foundation.

Defendants cite and rely on the three instruments constituting the Berlin Accords: i) The July 17, 2000, bilateral Executive Agreement between the United States and the Government of the Federal Republic of Germany Concerning the Foundation Remembrance, Responsibility and Future; ii) the July 17, 2000, "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation Remembrance, Responsibility and the Future,'" a document that the United States, Germany, six other nations and a number of private parties signed; and iii) legislation (the "Foundation Law") that the German Bundestag enacted shortly thereafter that, among other things, established the Foundation as a German sovereign instrumentality and as the "exclusive remedy and forum" for resolution of asserted claims against German companies arising out of the Nazi-era and World War II.

The German companies have delivered DM 5.1 billion to the Foundation, which, according to Defendants, meets the requirements of Para. 4(d) of the Joint Statement. Defendants reject the Plaintiffs' contention that the German companies owe more interest to the Foundation pursuant to the last sentence of Para. 4(d), noting that the competent German institutions specified in the Berlin Accords, namely, the Foundation's Board of Directors and the German Ministry of Finance, concluded that no additional interest is owed.

Defendants' initial contention is that the Complaint fails to state a claim because the Joint Statement does not create privately enforceable obligations, quoting the Court of Appeals's observation that "[t]here is much to support the view . . . that the Joint Statement is a political document." *Gross*, 456 F.3d at 385.

First, Defendants argue that the plain language of the Joint Statement, without recourse to parol evidence, compels the conclusion that the Joint Statement is not a departure from the general rule of international law that international diplomatic documents do not create privately enforceable rights. On its face, the Joint Statement is a declaration of mutual expectations, describing commitments between and among the nation-signatories and declaring broad principles. The language, according to Defendants, rejects the possibility of litigation: (i) "[t]he establishment of the Foundation does not create a basis for claims against the Federal Republic of Germany or its nationals." (Joint Statement at Preamble ¶ 11) and (ii) the Preamble expresses the objective of all signatories that there be "all embracing and enduring legal peace" for German companies. (*Id.* at ¶ 9).

The Joint Statement contains no language granting rights of private enforcement or specifying how a party should proceed if it wished to enforce the Joint Statement. According to Defendants, the title, structure and language of the Joint Statement

are incompatible with the conclusion that, by silent implication, it created obligations that could be privately enforced in court, contrasting the very title of the Joint *Statement* with that of the Executive *Agreement*. The Defendants contrast the obligatory language of the Executive Agreement with that used in the Joint Statement. Further, eight sovereign nations which were immune from suit as well as non-governmental agencies, signed the Joint Statement. According to Defendants, the language regarding interest in Para. 4(d) is descriptive of when interest will start accruing and imposes no obligation on the part of the German government or the German companies to pay interest starting at any particular time or at any particular rate.

Defendants further argue that the language and structure of the Berlin Accords in their totality demonstrate that the Joint Statement did not create legal privately enforceable obligations, noting in particular Article 1(3) of the Executive Agreement that provides that Germany, not the United States or its courts, is to supervise the Foundation:

> The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

Defendants point to the Foundation Law and the detailed manner in which it provides for the

governance of the Foundation, the amounts that the Federal Republic of Germany and the German companies were to contribute to the Foundation, and oversight by the German Federal Ministry of Finance, which has concluded that the German companies do not owe any additional interest to the Foundation. In these circumstances, Defendants argue, that "it is clear on the face of the documents constituting the Berlin Accords and Foundation Law that the participants did not intend the Joint Statement, or any part of it, to be a contract enforceable in a U.S. Court, but provided other institutions to govern and oversee the Foundation." (Def.s' Br. at 27).

Further, Defendants assert even if the Joint Statement were a contract binding on the German companies, in Para. 4(d) the Defendants did not undertake to pay interest in any amount or to collect contributions on a schedule that would earn any interest in excess of DM 100 million. The court will defer giving a synopsis of Defendants' argument about the meaning of the interest provision in Para. 4(d) until it addresses the question whether that provision is ambiguous, requiring a review of extrinsic evidence.

B. *Banks' Motion to Dismiss Schwartz Lee Complaint*: The only two Defendants named in the *Schwartz Lee* complaint are Deutsche Bank AG ("Deutsche Bank") and Dresdner Bank AG ("Dresdner Bank") (collectively "the Banks"). They are also Defendants in the *Gross* case and are parties to the motion to dismiss in that case. The *Schwartz Lee*

complaint contains two causes of action: breach of contract and fraudulent misrepresentation.

Plaintiffs allege that in December, 1999, an Agreement was reached requiring the German Government and German industry to contribute DM 10 billion to the Foundation "to terminate litigation pending in American courts against German defendants." (Compl. Para. 23-32). Plaintiffs further allege that in early December, 1999, the "Germans" made an offer of DM 8 billion, which was rejected by Plaintiffs. (*Id.* at Para. 23). On December 13, 1999, the Complaint alleges, Michael Hausfeld Wrote to Count Lambsdorff, the lead negotiator for the German Government, extending a "counteroffer" with the language, "[t]he German side agrees to a 10 billion DM present value settlement, excluding costs of administration, distribution, notice, and fees . . . " (*Id.* at Para. 24) (the "Hausfeld Letter"). Stuart Eizenstat, the lead negotiator for the U.S. Government, is alleged to have responded the next day by informing Mr. Hausfeld in a phone call that "[t]he Germans have accepted. You have a deal." (Compl. at Para. 26). Plaintiffs claim that this correspondence and telephone call constituted the "Agreement" (*id.* at Para. 3) committing the German companies to provide to the Foundation all interest earned on their DM 5 billion contribution as of December, 1999. (*Id.* at Para. 3, p. 83-86).

The Banks note that there is no allegation that any of the participants in the correspondence

(Hausfeld, Eizenstat, and Lambsdorff) had authority to act on behalf of the Banks or that an offer was transmitted to, or accepted by, the Banks. Further, the Banks note that Chancellor Schroeder wrote to President Clinton the day after Mr. Hausfeld made his counteroffer and specifically rejected Mr. Hausfeld's demand that the German contribution be DM 10 billion "present value" as of December, 1999. Finally, the Banks contend that documents post-dating December, 1999, that are attached to and cited throughout the Complaint, establish that no binding agreement was reached in December, 1999.

As to the fraudulent misrepresentation claim, the Banks seek dismissal on the ground that the Complaint fails to identify a single statement made by any representative of the Banks, any statement directly attributed to the Banks, or any misrepresentation of any kind relied on by Plaintiffs.

C. *Evidence upon Which Defendants Rely*: Defendant Banks submitted the Declarations of four of the active participants in the negotiations leading to the Berlin Accords: Count Otto Lambsdorff, Chancellor Schroeder's special representative and lead negotiator for the Federal Republic of Germany during most of the negotiations; Roger M. Witten, Esq., a partner of the firm of Wilmer Cutler Pickering Hale and Dorr LLP which represented GEFI in connection with the negotiations; Dr. Manfred Gentz, who held the position of Chief Financial Officer of Daimler-Chrysler AG during the negotiations and who was

de facto spokesman and negotiator for GEFI; Dr. Horst Kohler, Group General Counsel of Deutsche Bank from 1995 through 2000 and who chaired the legal working group of GEFI.

Count Lambsdorff, representing the German government, was Secretary Eizenstat's counterpart. The two worked closely and cooperatively together to achieve a final resolution of the victims' claims. Opening his Declaration, Count Lambsdorff stated the continuing objective of the German side – Government and companies:

> The principal aims of the German Government and German companies in establishing the Foundation, "Remembrance, Responsibility and the Future," were: a) to establish and fund a German Foundation for making payments to certain victims of the National Socialist era and World War II that would be an instrumentality of the FRG governed entirely by German Laws and institutions and which would not be subject to oversight or review by U.S. courts; and b) to obtain all-embracing and enduring legal peace for German companies, not only in the U.S. but elsewhere.

(Lambsdorff Decl. Para. 2).

Count Lambsdorff views the Joint Statement as a political statement rather than a contract enforceable in a court:[5]

> The JS, which was signed by eight sovereign nations as well as by private parties (e.g. Conference on Jewish Claims in Germany), was a political statement describing the results of the talks leading to the establishment of the Foundation, through German legislation, as a German sovereign instrumentality. While I have no reason to doubt that all the participants who affixed their signatures to it expected that they themselves and the other signatories would in fact take the steps set forth therein, there was no agreement, express or implied, that a signatory to the JS (or any other person) could institute litigation in the U.S. or elsewhere to enforce the JS. To my knowledge, at no point in the negotiations that led to the BAs did anyone even propose to the German side that the JS be enforceable through private litigation, and I am certain that the German side did not agree that a signatory or other person could bring litigation in a U.S. court to compel action by a JS signatory. That is why both the JS and EA were written (i) to make no provision for private enforceability; and (ii) instead to provide for oversight, in the

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[5] In his Declaration Count Lambsdorff refers to the Berlin Accords as "BA", to the Joint Statement as "JS", and to the Executive Agreement as "EA".

> event of disputes, by designated German governmental authority. Notably in this regard, the JS specifically provides that the creation of the Foundation does not provide a basis for the assertion of any claims against Germany or German companies. In these respects, the JS and EA are entirely consistent with the objectives set forth in the first paragraph above.

(*Id.* at Para. 4).

In particular, Count Lambsdorff states that the interest issue had already been resolved in the manner contemplated by the Berlin Accords:

> German institutions have, in the manner provided for in the BAs, considered whether German companies owe additional interest to the Foundation Remembrance, Responsibility and the Future and, correctly in my view, have concluded that none is owed. Those decisions were taken by the Foundation's Board of Directors, as well as by the German Ministry of Finance exercising its statutory authority under the Foundation Law. That conclusion has been communicated to the United States Government through diplomatic channels and has appropriately been the subject of diplomatic correspondence between the two countries, as reflected in the Eichel letter (attached as Exhibit A) and the Armitage letter (attached as Exhibit B). Notably, Undersecretary Armitage's letter on behalf of the U.S. Government to me states that the interest dispute is

> not for resolution "by the courts," a view that is of course consistent with my own understanding that the JS is not privately enforceable.

(*Id.* at Para. 5)

The Exhibit A to which the Declaration referred was a letter from the German Minister of Finance to Secretary of State Colin Powell stating that he had reviewed the contentions of the Plaintiffs' attorneys and found that "[t]he German Federal Government shares the position of the Foundation Initiative that, under paragraph 4(d) of the Joint Statement of July 17, 2000, the Foundation Initiative of German Industry was obligated to pay a total of DM 5.1 billion as capped amount." The letter also stated, "I am convinced that the Government of the United States will be able to defend German companies against suits in United States courts as promised under the Executive Agreement of July 17, 2000."

Exhibit B to which reference is made in Para. 15 of the Lambsdorff Declaration is a copy of Undersecretary Armitage's letter to Count Lambsdorff stating that "[t]he U.S. Government has no independent information that conclusively resolves disagreements surrounding the interest issue," but that "[t]he policy of the United States has been that the proper venue for addressing issues concerning the Foundation are in the Foundation or through U.S. German diplomacy. Therefore, the U.S. Government believes that matters concerning interest payments should be

resolved as a political matter in these domains, and not by the courts."

Count Lambsdorff addressed Plaintiffs' contention that there was an agreement that interest would be payable on the DM 10 billion from either December 9 or December 14 or December 17, 1999:

> On December 13, 1999, I received a letter from Michael Hausfeld (attached as Exhibit C) with the language, "The German side agrees to a 10 billion DM present value settlement, excluding costs of administration, distribution, notice, and fees. . . . "
>
> As of the date of Mr. Hausfeld's letter, the discussions had always focused on a capped amount to be contributed by the German side. As of that date, there certainly was no agreement that any interest would be contributed by the German Government or the German companies.
>
> I did not convey authority to Mr. Eizenstat or to anyone else to accept the proposals contained in Mr. Hausfeld's December 13, 1999 letter on behalf of the German Government. I certainly did not convey authority to Mr. Eizenstat or to anyone else to accept the proposals contained in Mr. Hausfeld's letter on behalf of the German companies. I did not believe that I had authority to speak on behalf of the German companies.
>
> As demonstrated by the December 1999 exchange of letters between President Clinton and Chancellor Schroeder (attached as

> Exhibits D and E) most of the terms in Mr. Hausfeld's December 13, 1999 were summarily rejected. Indeed, Chancellor Schroeder's letter dated December 14, 1999, referenced Mr. Hausfeld's December 13, 1999 letter and then expressly rejected the further demands by plaintiffs' lawyers, including the suggestion in Mr. Hausfeld's December 13, 1999 letter that the DM 10 billion cap represented a present value sum. The December 17, 1999 announcement (attached as Exhibit F) also identified only a specific and capped amount of DM 10 billion and made absolutely no mention of any interest accruing for the benefit of the German Foundation. That is because at that time there simply was no agreement between the German and U.S. governments concerning interest on that Capped amount. Nor, to my knowledge, did the German companies agree at that time to any interest payment on the capped amount.

(*Id.* at Paras. 6-9).

Exhibit D, to which the Declaration referred, was President Clinton's December 13, 1999 letter to Chancellor Schroeder, noting that Secretary Eizenstat had informed him that the Plaintiffs' attorneys and the other claimants "would agree to settle at DM 10 billion," and that this "will establish for the first time a flat sum and ceiling agreed by all participants in this process." President Clinton urged Chancellor Schroeder to prevail upon the German side to agree to this capped amount.

Exhibit E to the Lambsdorff Declaration is Chancellor Schroeder's December 14, 1999 letter responding to President Clinton's letter in which he accepted the President's proposal and announced that "we have decided to increase the financial endowment of the Federal Foundation to a total of 10 billion DM." He further specifically rejected Mr. Hausfeld's December 13 demands:

> Two aspects were particularly important for this decision: First of all, the amount of 10 billion DM which will be furnished by the German side is the final amount. All contributions of the Federal Foundation – for NS forced laborers, for property damages and for the Future Funds – will be financed from this amount. All the other costs related to the Federal Foundation are included. Further demands, as they were presented by attorneys for the plaintiffs yesterday, are being rejected by the Federal Government in accordance with the U.S. government.
>
> The second central argument for your proposal are the substantial improvements concerning legal closure which were reached during the last few days. I appreciate very much the promise made by the U.S. Government to point to the foreign-policy interests in all pending and future litigation and to use its influence to reach a dismissal of action. The same goes for the willingness of the U.S. Government to give a Statement of Interest which is independent from the attitude of the plaintiffs. I am by the way

> proceeding on the assumption that this consensus will take away the basis for legislative and administrative actions against German enterprises and that the U.S. Government will enforce the annulment of the actions on the Federal and state level.
>
> The Federal Government went to the limits of what was possible in order to achieve [the agreement]. Therefore it will decisively reject any further demands. I am also aware of the substantial efforts of the U.S. Government. I am very grateful for the special involvement in this cause to you, your government and especially to our special envoys, Stuart Eizenstat and Otto Graf Lambsdorff.[6]

Count Lambsdorff categorically denied that there was a subsequent agreement that interest would accrue on the DM 10 billion. He stated that despite Secretary Eizenstat's repeated requests that an interest factor be added, Secretary Eizenstat ultimately dropped his proposals that the German companies pay interest and instead explored with Count

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[6] Remarkably, in his Declaration seeking to establish the existence of an agreement to pay interest on the DM 10 billion from December 1999, Mr. Hausfeld fails to attach a copy of Chancellor Schroeder's December 14, 1999, letter. Instead, in what can only be an attempt to conceal or camouflage it, he attaches a copy of an April 3, 2000 letter from a Special Assistant to the President stating that the December, 1999 exchange of letters between the heads of state did not constitute "an international agreement or a statement of the existence of an international agreement."

Lambsdorff whether the due date for the German Government's money could be advanced so it could start earning interest. (*Id.* at Paras. 10, 11).

> It is important to understand that the German Government contribution was not due to be contributed to the Foundation until the dates specified in the JS, and the German company contribution was not due to be contributed to the Foundation until all the cases were dismissed with prejudice. Thus, there was no "deferral period." It is entirely mistaken to suggest that the money was to be contributed at some earlier date, that the date for such a contribution was deferred to a later date; and that interest was owed in light of the passage of time. Accordingly, there was no agreement that interest would run during any so-called "deferral period."
>
> After the December 17, 1999 announcement that an agreement in principle had been reached, the U.S. Government, through Deputy Secretary of the Treasury Stuart Eizenstat, from time to time sought, in meetings with the German side alone, an agreement that the German companies contribute their funds to the Foundation at a date prior to the dismissal of the cases pending in the U.S. or, alternatively, that German company funds would accrue interest for the benefit of the Foundation. The German companies with the full consent of the German Government, however, repeatedly rejected the U.S. Government's proposals, and the U.S.

> Government ultimately abandoned its position in this regard.
>
> (*Id.* at Paras. 10, 11).

Secretary Eizenstat was engaged with Count Lambsdorff in the extremely difficult task of allocating the DM 10 billion among the various claimants. According to Count Lambsdorff, Secretary Eizenstat had hit an impasse and had to obtain an additional DM 100 million to prevail upon the Polish Government and the World Jewish Congress to accept a final allocation. This amount could only be obtained by raising GEFI's contribution by that amount:

> . . . after long and arduous talks the Foundation Initiative agreed under the provision that this additional amount did not enter into the principal of the promised amount in public. This was the genesis of the word "interest", in reality covering the fact that so far the total amount of 10 billion DM was no longer capped. So the interest was in reality no interest, which does not preclude the fact that once the sum was deposited in the Foundation's Account, it generated a much higher interest than this sum and, as a matter of fact, the Future Fund of the Foundation is meant to be financed perpetually from interest earned.
>
> In regard to that issue, on April 19, 2000, I wrote the following in a letter to Deputy Secretary Eizenstat: "In December 1999 the companies of the German Foundation Initiative agreed to do everything to contribute the

> amount of 5 billion DM to the Foundation capital, and in March this year they agreed to a specific allocation of further 100 M.O. DM generated by interest. Although the Initiative's difficulties raising this substantial amount are well known and have been deplored by the German Chancellor and myself publicly, I have no doubt that the Initiative will finally succeed. The Initiative, however, has always underlined that it will turn its contribution over to the Foundation only when the class action suits have been dismissed, which is hopefully the case well before the end of the year." My personal hope did not, however, become the basis for assumption of an interest obligation by the German companies.

(*Id.* at Paras. 12, 13).

Count Lambsdorff set forth his interpretation of paragraph 4(d) of the Joint Statement:

> Paragraph 4(d) reflects the agreement as I understood it: the German Government's contribution to the Foundation would be made on two specified dates prior to the dismissal of the lawsuits in the U.S. and interest on those German Government funds could be collected from those dates for the benefit of the Foundation; by contrast, the DM 5 billion contribution by the German companies was not to be contributed to the Foundation until all cases against the German companies in the U.S. had been dismissed with prejudice; and that the German

> companies would continue to collect funds so that, during the period before the German transfer, the German company contributions would generate in the aggregate at least the sum of DM 100 million that had been mentioned. It is my view that the German companies fulfilled that obligation by transferring DM 5.1 billion to the Foundation. I am informed that the German company contribution generated substantial interest for the Foundation after its transfer to the Foundation, as anticipated.

(*Id.* at Para. 14).

Roger M. Witten, Esq., who represented GEFI during the negotiations, states in his Declaration that "I can unequivocally state that the participants did not reach an agreement in December 1999 or at any other time that the capped amount of DM 10 billion was a 'present value' figure. That notion was, as far as I am aware, floated only in a letter dated December 13, 1999 from Michael Hausfeld to Otto Graf Lambsdorff . . . and was promptly rejected by the German Government . . . in a letter dated December 14, 1999 from Chancellor Schroeder to President Clinton." (Witten Decl. at Para. 8).

Further, according to Mr. Witten, he discussed Mr. Hausfeld's demand with Secretary Eizenstat: "On December 13, 1999, my then partner Lloyd N. Cutler and I spoke by telephone with Deputy Secretary Eizenstat and objected to Mr. Hausfeld's letter to Graff Lambsdorff; Deputy Secretary Eizenstat

advised us that we could ignore Hausfeld's letter, which he referred to dismissively, because he (Eizenstat) had 'taken care of it'" (*Id.* at Para. 8).

Mr. Witten also explained how in March, 2000, the additional DM 100 million so-called "interest" was agreed upon:

> Second, in March 2000, during negotiations regarding how the DM 10 billion would be allocated among the different categories of victims and all other programs and expenses of the Foundation, it became apparent that political agreement could not he reached within the capped sum of DM 10 billion, and that a further DM 100 million would be necessary to fund the allocated amounts. It was observed that interest on the DM 10 billion capped amount could be used to meet the DM 100 million shortfall. Thus, in order to avoid affecting the previously agreed DM 10 billion capped sum, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest." On March 23, 2000, the participants in the negotiations resolved the allocation issue (the result of which is attached to the Joint Statement as Appendix B), allocating DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern European and DM 50 million in interest for insurance claims).

> I am not aware of any direct oral or written communication between any plaintiffs' lawyer and GEFI prior to the signing of the Berlin Accords regarding the subject of expected interest other than the DM 100 million which was unanimously agreed to and set forth in Annex B of the Joint Statement. At no point, did Burt Neuborne, Mr. Hausfeld, or their colleagues communicate to GEFI the theories regarding interest found in their briefs and declarations in this litigation, for example, the "deferral period" theory. GEFI never agreed to any of the interest theories Plaintiffs' counsel now put forward.

(*Id.* at Paras. 9, 10).

Mr. Witten described in great detail his discussions with Secretary Eizenstat during which Secretary Eizenstat argued forcefully for an interest provision, requiring the German companies to either pay over their contribution before dismissal of the U.S. law suits or to pay interest on the funds collected. Mr. Witten further describes how he, on behalf of GEFI, rejected these demands:

> As next described, the content of discussions regarding interest and the history of the drafting of the Joint Statement demonstrate that while Deputy Secretary Eizenstat made certain proposals relating to interest, GEFI rejected those suggestions, and Deputy Secretary Eizenstat acquiesced in GEFI's position.

In particular, on June 12, 2000, I attended a meeting hosted by Deputy Secretary Eizenstat at the U.S. Treasury Department in Washington, D.C. with representatives of the U.S. and German Governments. The attendees included Graf Lambsdorff and Dr. Manfred Gentz, who was the de facto spokesperson for GEFI. At that meeting, the German side reconfirmed its longstanding position that German company payments to the Foundation would not be due until all cases were finally dismissed with prejudice. In response, Deputy Secretary Eizenstat said that plaintiffs' lawyers might object to this position but might be placated if the German companies agreed to pay interest on their DM 5 billion to the Foundation; and second, to generate DM 100 million in interest. Dr. Gentz said GEFI would keep those commitments but would not discuss any other arrangements. Count Lambsdorff volunteered that the German Government (not German companies) might agree that its own DM 5 billion contribution could be made to the Foundation before the dismissal of all cases against German companies. The focus of how to generate funds in excess of DM 100 million subsequently switched from German companies as the potential source to the German Government. In fact, as reflected in paragraph 4(d) of the Joint Statement, as signaled by Count Lambsdorff at this meeting, the German Government committed to pay its DM 5 billion to the Foundation in two tranches on specified dates that preceded

dismissal of all the cases against German companies and that German Government funds would begin earning interest for the benefit of the Foundation immediately upon being made available to the Foundation.

On June 30, 2000, I attended another meeting with Deputy Secretary Eizenstat and other representatives of the U.S. Government at the U.S. Treasury Department in Washington, D.C. At that meeting, Deputy Secretary Eizenstat again sought, unsuccessfully, to persuade German companies to generate interest in addition to the DM 100 million. He noted that the German companies would not agree to a deadline when their DM 5 billion would be collected or would begin earning interest. He again asked us to consider agreeing to raise the full DM 5 billion by a date certain, suggesting December 31, 2000, and further suggested that we should agree that interest would accrue on the entire amount from that date forward for the benefit of the Foundation. He pointed to a draft of the joint Statement that the U.S. Government had recently circulated dated June 24, 2000 (attached as Exhibit D) in which the U.S. Government had proposed to include the following sentence at the end of paragraph 4(d): "The DM 5 billion contribution of German companies will be collected in full and begin to earn interest no later than October 31, 2000." Echoing what Dr. Gentz had said on June 12, I told Deputy Secretary Eizenstat that: German companies would not agree to transfer any funds until

> all cases had been dismissed; German companies had made a commitment to collect DM 5 billion and to earn DM 100 million in interest; German companies had not made any other commitments; and the U.S. Government's proposed addition to the language of paragraph 4(d), just quoted, was not acceptable to German companies. At the meeting, Deputy Secretary Eizenstat dropped his proposal and said he would as an alternative speak with Count Lambsdorff to see if the German Government's money (not the German companies' money) could earn interest. The language quoted above that the U.S. Government sought to insert into paragraph 4(d) was not agreed to and does not appear in the signed version of the Joint Statement.

Attached to Mr. Witten's Declaration as Exhibits D-O are copies of each of the drafts of agreements to which he refers in his declaration. Each sought to increase the amount of interest the German companies would pay to the Foundation beyond the DM 100 million agreed to in March, 2000, by accelerating payment of the DM 5 billion or by depositing the collected funds in an interest bearing account or by paying interest from a specified date. Each demand was categorically rejected. The series of U.S. Government proposals as described by Mr. Witten are set forth in Appendix A to this opinion.

Defendants also submit the Declaration of Dr. Manfred Gentz. During the period of negotiations he held the position of Chief Financial Officer of Daimler

Chrysler AG, one of the twelve companies (later expanded to seventeen) that were the founding members of GEFI. GEFI proposed the establishment of the Foundation and led the campaign to raise money from German companies for the DM 5 billion company contribution to the Foundation. He was a de facto spokesman and negotiator for GEFI.

Echoing Count Lambsdorff, Dr. Gentz recited that "[i]n proposing the creation of a foundation, the primary objectives of GEFI were: (i) to establish and raise voluntary contributions to fund a German foundation that would operate as a German institution to address the moral and historical responsibility of German companies for the use of forced labor and other injustices arising out of the Nationalist Socialist era and World War II; (ii) to establish a Future Fund to foster sensitivity re. human rights violations and the protection of minorities as well as the better understanding between peoples; and (iii) to obtain all-embracing and enduring legal peace for German companies in the United States and elsewhere without entering into a class action settlement or its equivalent." (Gentz Decl. at Para. 3).

Dr. Gentz described how in 1998 the founding members of GEFI approached German Chancellor-elect Schroeder to obtain German Government support for the initiative to establish a foundation. The German government offered its support, first as a solely German company initiative, but later as a joint German company-German Government effort. (*Id.* at Para. 4). The German Government approached the

United States Government in 1998 for assistance, and the two governments thereafter agreed to sponsor international negotiations in order to reach consensus among as many interested participants as possible. This led to negotiations with six additional governments (the Republic of Belarus, the Czech Republic, the State of Israel, the Republic of Poland, the Russian Federation, and Ukraine); GEFI; the Conference on Jewish Material Claims Against Germany, Inc., and some of the plaintiffs' lawyers who had initiated lawsuits in the United States against German companies. These talks were co-chaired by Secretary Eizenstat and Count Lambsdorff. (*Id.* Paras. 5-6).

Dr. Gentz recited that early in the negotiations both the German companies and the German Government rejected the proposal of Plaintiffs' counsel that the U.S. litigation be resolved through class action settlement agreements between Plaintiffs and defendants in the lawsuits. Dr. Gentz stated the reasons for rejecting the class action settlement mode:

> These proposals were rejected for several reasons. First, German companies viewed the claims asserted in the U.S. cases as involving reparations that, under international law, could only be asserted by governments and not their citizens; class action settlements would have been inconsistent with this strongly held German view. Furthermore, the notion of U.S. court supervision was contrary to the underlying objective

of German companies and the German Government to address their moral and historical responsibility through German institutions and under German law and not through American legal procedures. As set forth in the Joint Statement, the German company proposal was "to send, as the century draws to a close, 'a conclusive humanitarian signal, out of a sense of moral responsibility, solidarity and self-respect.'"

Moreover, the Federal Republic of Germany categorically rejected class action settlements and any notion of U.S. court jurisdiction over any aspect of the Foundation because of issues of sovereign immunity. As stated in the Berlin Accords, the establishment of the Foundation was the culmination of 55 years of German Government and intergovernmental efforts to address the consequences of the National Socialist era and World War II. Thus, the German side – both GEFI and the German Government – repeatedly stated their objective of establishing a German Foundation under German law, to be governed and regulated by German institutions outside any oversight or review by U.S. courts. In my view, that is precisely what the Berlin Accords and Foundation Law achieved.

The German side – GEFI and the German Government – also repeatedly explained their primary objective in establishing "all-embracing and enduring legal peace" for German companies. This meant not only the

> final dismissal with prejudice of all pending cases in U.S. courts but also a mechanism for securing dismissal of any cases filed in the future. Again, this is repeatedly stated in the Berlin Accords.

(*Id.* Paras. 8-10).

Citing the December, 1999 exchange of letters between President Clinton and Chancellor Schroeder, Dr. Gentz, stated that "[i]n December 1999, the German and U.S. Governments reached political agreement on a capped sum for the Foundation of DM 10 billion, with the German Government and German companies each agreeing to contribute DM 5 billion . . . All participants in the negotiations expressed their agreement that the DM 10 billion figure represented a capped sum and that no further contributions were expected from either the German Government or German companies." (*Id.* at Paras. 11, 12).

Addressing Plaintiffs' claim that in December, 1999, the German side agreed to pay interest, Dr. Gentz stated, "[c]ontrary to plaintiffs' assertions, neither GEFI nor any German companies agreed in 1999 to the payment of any interest on either the DM 10 billion capped amount or on the German company contribution. In fact, there was no discussion at all in 1999 involving GEFI or any German companies regarding interest. Indeed, as far as I am aware, the only mention in 1999 of 'interest' that was ever communicated to the German side was a *demand* by Michael Hausfeld that the DM 10 billion capped sum

must be a 'present value settlement' . . . Mr. Hausfeld's demand was never accepted by GEFI or any German companies. Indeed, it was expressly rejected the very next day by the German Government in Chancellor Schroeder's letter to President Clinton dated 14 December 1999 . . . " (*Id.* at Para. 13).

Dr. Gentz addressed DM 100 million "interest" payment – how it arose and the extent of the commitment:

> Following the December 1999 agreement on a capped sum of DM 10 billion, the participants sought to reach agreement on an allocation of that amount for payments to the various categories of victims and all other programs and expenses of the Foundation. In March 2000, during these negotiations on allocation, it became apparent that political agreement among all participants in the talks could not be reached within the capped sum of DM 10 billion and that a further DM 100 million would be necessary to fund the allocated amounts. It was observed, however, that interest on the DM 10 billion capped amount could be used to meet the DM 100 million shortfall. In order to avoid affecting the previously agreed DM 10 billion capped sum, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest," and a consensus was reached to this effect.

> On 23 March 2000, the participants in the negotiations reached agreement on an allocation of the capped sum. That allocation agreement is attached to the Joint Statement as Annex B. It allocates DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern Europeans and DM 50 million in interest for insurance claims).
>
> I am not aware of any discussion involving GEFI or any German companies in which any amount of expected interest – other than the DM 100 million which was unanimously agreed to and set forth in Annex B to the Joint Statement – was mentioned, let alone agreed to. There certainly was no agreement on the part of GEFI or German companies that any transfer of interest in excess of DM 100 million was expected.

(*Id.* at Paras. 14-16).

Dr. Gentz described how after the March, 2000 agreement on allocation was arrived at, the issue of timing of the contributions arose, with Mr. Eizenstat pushing for payment by the companies prior to dismissal of the U.S. cases, or, alternatively, for an agreement that the German company funds would accrue interest from a date prior to the transfer of German company funds to the Foundation. As Dr. Gentz stated, "I and others on the German side repeatedly rejected these U.S. Government proposals, and the U.S. Government ultimately abandoned its

efforts in this regard. Instead, the U.S. Government focused its efforts on establishing dates certain for the contribution of German *Government* funds, at which point those government funds would begin to accrue interest immediately. I and others on the German side repeatedly stated that the only date that was acceptable to the German companies for triggering the transfer of German company funds to the Foundation was the date on which all pending cases in the United States were dismissed with prejudice. This is reflected in paragraph 4(d) of the final version of the Joint Statement that was signed." (*Id.* at Paras. 17, 18).

Dr. Gentz describes in his Declaration that the United States made several proposals to incorporate in the Joint Statement a date certain by which interest would begin to accrue and to place contributions into interest bearing accounts, all of which GEFI rejected. GEFI also rejected the drafts of the Joint Statement incorporating such proposals, none of which were included in the July 17, 2000 Joint Statement. (*Id.* at Para. 19).

Dr. Gentz described a June 12, 2000 meeting hosted by Secretary Eizenstat at which Count Lambsdorff and Mr. Witten were also present:

> On 12 June 2000, I attended a meeting at the U.S. Department of Treasury hosted by Mr. Eizenstat. Graf Lambsdorff and Mr. Witten of Wilmer, Cutler & Pickering also attended the meeting. Mr. Eizenstat again sought to persuade the German side to agree

> to begin accruing interest for the benefit of the Foundation on the full DM 5 billion amount of German company funds as of a date certain, which he suggested should be 1 January 2001. Mr. Eizenstat explained that he thought this would satisfy the plaintiffs' lawyers who might otherwise object, given the position I had repeatedly stated that the German companies would not transfer their DM 5 billion contribution to the Foundation until all cases pending in U.S. courts were dismissed with prejudice. I rejected this U.S. Government proposal by Mr. Eizenstat and reiterated that the German companies had made and would make only two financial commitments: (i) to contribute DM 5 billion to the Foundation when all cases were dismissed; and (ii) to collect German company funds on a schedule and in a manner so that they would include DM 100 million designated as interest. Mr. Eizenstat later did not insist any longer to persuade German companies to agree to contribute their DM 5 billion before dismissal of all cases and abandoned his proposal that German company funds should begin earning interest as of a date certain.

(*Id.* at Para. 21).

Dr. Gentz's Declaration concludes with his understanding of the meaning of the disputed terms of the Joint Statement, which are those which Defendants advocate in this case.

Finally, Defendants rely on the affidavit of Dr. Klaus Kohler to support certain of their contentions advanced in the Banks' motion to dismiss the *Schwartz Lee* complaint. He served as Group General Counsel of Deutsche Bank from 1995 through 2000.

Deutsche Bank was one of the twelve founding members of GEFI, and Dr. Kohler chaired GEFI's legal working group. (Kohler Decl. at Paras. 1-2). In his Declaration he described the formation of GEFI, its enlistment of Chancellor Schroeder and the German Government as participants in the efforts to create the Foundation, and the convening of plenary sessions during the course of the negotiating process. (*Id.* at Paras. 3-6).

Dr. Kohler cited the agreement that the Foundation was to be funded by a DM 5 billion contribution of the German government and a DM 5 billion contribution to be raised from "the German economy." Referring to Mr. Hausfeld's December 13, 1999 letter, he stated: "My assumption, however, is that the following passage cited from the letter of December 14th, 1999, of the German Chancellor Schroeder to President Clinton is exactly referring to and, in full conformity with GEFI's view, clearly rejecting any claims made in the Hausfeld letter beyond a capped amount of DM 10 billion: . . . 'All the other costs related to the Federal Foundation are included. Further demands, as they were presented by attorneys for the plaintiffs yesterday, are being rejected by the Federal Government in accordance with the U.S. Government . . . '" (*Id.* at Para. 8).

Dr. Kohler was not authorized to accept and did not accept the Hausfeld terms nor did he authorize anyone else to do so. Further: "Count Lambsdorff's involvement in the negotiations was as a representative of the German Chancellor. Mr. Eizenstat acted on behalf of the U.S. Government. Neither Count Lambsdorff nor Mr. Eizenstat had the power or were authorized to bind Deutsche Bank or any of the GEFI companies in any way, let alone to a '10 billion DM present value' settlement." (*Id.* at Para. 10).

Dr. Kohler described how, following the announcement of the DM 10 billion capped fund, Deutsche Bank, together with the other funding members of GEFI, intensified their participation in the fund raising effort to collect DM 5 billion, "but at no time did Deutsche Bank agree to individually pay a principal amount of DM 5 billion to the Foundation, either in its own name or as a part of the Foundation Initiative." (*Id.* at Para. 12).

Concerning the DM 100 million "interest" amount, Dr. Kohler stated:

> I understand that by the end of March 2000, the parties recognized that an additional DM 100 million was needed to satisfy all of the parties to the negotiations. To resolve the allocation problem, GEFI eventually agreed that it would collect the funds in a manner that would ensure that an additional DM 100 million would be available to cover the agreed allocation. That resolution to the allocation issue is reflected in Annex B to the

> Joint Statement. It allocates DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern Europeans and DM 50 million in interest for insurance claims).
>
> In order to avoid affecting the previously agreed DM 10 billion capped sum, also being confirmed both by President Clinton and Chancellor Schroeder, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest," and a consensus was reached to this effect.

(*Id.* at Paras. 17-18).

Dr. Kohler addressed the Plaintiffs' contention that in addition to the DM 100 million, interest is owing on the German companies' DM 5 billion:

> Although the size of the contribution to the foundation was agreed upon in December 1999, this was not the end of the negotiations. Many critical issues remained unresolved and negotiations and discussions continued through July 17, 2000 on such major issues as allocation of the DM 10 billion, the language of the Foundation Law, the structure of the Foundation, dismissal of the pending cases in U.S. Courts, and other issues.
>
> Throughout the discussions in the first half of 2000, the U.S. Government raised the issue of the timing of the transfer of GEFI's

DM 5 billion to the Foundation. On several occasions, the U.S. Government, through Mr. Stuart Eizenstat, proposed specific dates on which the German companies would contribute their DM 5 billion in funds to the Foundation. Dr. Gentz regularly rejected that request, informing Mr. Eizenstat that the German companies refused to permit transfer of GEFI's funds to the Foundation prior to the dismissal of all cases pending in the United States. The final language of paragraph 4(d) of the Joint Statement reflects my understanding that all parties agreed that the DM 5 billion contribution would not be provided to the Foundation until there was dismissal of all pending cases.

Another proposal made by the U.S. Government was an attempt to impose an obligation that interest accrue on GEFI's DM 5 billion contribution as of a specific date prior to the transfer of the funds to the Foundation. Dr. Gentz rejected this proposal on behalf of GEFI, too. The signed version of the Joint Statement does not require interest to begin accruing on German Economy's DM 5 billion contribution as of any specific date. This is consistent with my understanding of GEFI's position throughout the negotiations and the agreement among the parties.

(*Id.* at Paras. 14-16).

VII. Federal Republic of Germany, Amicus

A. *Contentions of Federal Republic of Germany*: The Federal Republic of Germany ("Germany") moved in the *Gross* and the *Schwartz Lee* cases for an order granting leave to file an amicus brief in support of the Defendants' position that they fulfilled all of their commitments regarding the funding or any related matter thereto, of the Foundation, which is an instrumentality of Germany. The motion was granted.

By way of background, Germany summarizes its efforts during the past 55 years to meet its moral and historical responsibility arising from racial and religious persecution and other injustices of the National Socialist era and to provide restitution and compensation to the victims of the Nazi era. It provided more than approximately $75 billion ($100 billion in today's value) in restitution and compensation to victims of National Socialism on the basis of German laws and ratified international treaties. Germany has consistently ensured that all restitution and reparation mechanisms are ultimately established by and subject to German law, regulated and administered by the German Government and its specialized administration at the federal and regional level and overseen by German courts. These restitution efforts, according to Germany, culminated in the Berlin Accords – the Joint Statement, the Executive Agreement, and the Foundation Law.

Germany challenges Plaintiffs' action in courts of the United States against GEFI and GEFI's founding

members, seeking to require them to pay additional interest to the Foundation despite the fact that both the German Ministry of Finance and the Foundation itself have stated that no such additional interest is due. According to Germany, "[s]uch a ruling would interfere with Germany's sovereignty, show a lack of respect for Germany's legal system and is contrary to the above-stated interests of Germany." (Germany's Brief at 4).

Germany relies upon the July 17, 2000, Executive Agreement between Germany and the United States, a product of nearly two years of negotiation under the leadership of Chancellor Schroeder and President Clinton, which calls for Germany to establish the Foundation pursuant to German law. The Executive Agreement makes it clear that it is in the foreign policy interests of the two nations for the Foundation "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II" and that "both parties desire all-embracing and enduring legal peace" for German companies with respect to the Nazi-era "to advance their foreign policy interests." (Executive Agreement Preamble Para. 15, *et. seq.*).

Germany also relies on the Foundation Law that the German Bundestag adopted on August 2, 2000, creating the Foundation. This legislation implements the Executive Agreement. It establishes the Foundation as the exclusive forum for all Nazi-era claims against German companies and excludes further

claims. Foundation Law, Para. 16(1). Germany maintains legal supervision over the Foundation. *Id.* § 8(1).

Germany cites the August 17, 2000 official statement of the U.S. Department of State issued in recognition of Germany's passage of the Foundation law:

> The United States welcomes German Acting President Biedenkopf's signature on August 12 of a law establishing the foundation "Remembrance, Responsibility and Future." The United States believes that the foundation should be the exclusive remedy for the resolution of all asserted Claims against German companies arising from the Nazi era. Claims covered by the law include slave and forced labor, aryanization, medical experimentation and other cases of personal injury and damage to or loss of property including banking assets and insurance policies.

(Statement by Philip T. Reeker, Deputy Spokesman, German Foundation for Holocaust Era Claims Established (U.S. Dept. of State, Office of the Spokesman, Aug. 17, 2000))[7].

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[7] Germany notes that during its six years of existence, the Foundation made nearly $6.33 billion in payments available to approximately 1,700,000 former forced laborers and other persons eligible for payments. By doing so, the Foundation paid approximately $427,142,000 more than initially estimated to these approximately 1,700,000 aging victims. This surplus was derived from interest earned by the Foundation after its

(Continued on following page)

Germany vigorously disputes that the Joint Statement is a private settlement agreement or a contract. Rather, Germany contends that it is what it says it is, a Joint Statement, signed by a number of governments, non-governmental entities and individuals, as a result of long and intense negotiations on a diplomatic level: "[I]t is a statement jointly given by all parties involved in the lengthy and complicated negotiations. The Joint Statement contemplated the establishment of the Foundation 'Remembrance, Responsibility and the Future.' It is a document that reflects the high level diplomatic and other efforts that were necessary to find a solution and sets forth a schedule or outline of the next steps the parties involved in the negotiations would take. It is not a settlement agreement subject to the jurisdiction of a court of the United States." (Germany's Brief at 7).

Germany contends that read in the context of the other documents that are part of the Berlin Accords and considering the kind of non-contract language used in the Joint Statement, the Joint Statement cannot be viewed as a contract, i.e., it is a statement of principles rather than a binding agreement. Germany quotes Ronald J. Bettauer, Deputy Legal Adviser in the United States Department of State, who participated in the negotiations; "It would not have been appropriate to have an international agreement

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endowment had been transferred to it through the investment of the original funds.

between individual lawyers, private companies, an NGO and sovereign states. We therefore developed a document that set forth political rather than legal commitments – that is, undertakings that various participants 'will' take various steps rather than legal commitments that they 'shall' do so." Ronald Bettauer, *Keynote Address – The Role of the United States Government in Recent Holocaust Claims Resolution,* 20 Berkeley J. Int'l L. 1,3 (2002). Germany's position is:

> It is the position of the German Government that the Joint Statement is not subject to enforcement by a United States Court, and that any dispute regarding the Joint Statement cannot be resolved through litigation in a United States court. All the diplomatic efforts put into the current solution to the long lasting issue of compensation and restitution programs for the victims of the Nazi-era which created the Foundation would be called into question if the Court found in favor of Plaintiffs.

(Germany's Brief at 10).

Germany contends that the Foundation is funded in full, noting that in implementing the Executive Agreement, the Foundation was established pursuant to a legislative act of the German Bundestag and the Foundation Law, which sets forth the governing structure of the Foundation, defines the overall endowment and allocation of Foundation funds and establishes criteria for payment. The Foundation Law

also establishes that administration of the Foundation is subject only to the legal supervision of the German Government through the Federal Ministry of Finance. The Foundation Law "does not provide for this legal review of the Foundation's actions by any United States court. Even if review by some sort of appeal in Germany is possible, the Act does not authorize litigation in the United States." *Ukrainian Nat'l Ass'n of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States*, 182 F. Supp. 2d 305, 310 (E.D.N.Y. 2001).

Germany notes that the Federal Ministry of Finance has held, after it reviewed the books of the Foundation, that no additional funds were owed to the Foundation and that Defendants have fulfilled their commitment to the Foundation in full. Under the Berlin Accords and in particular the Foundation Law, that should end the matter unless any person or entity that objects seeks review in the German legal system.

B. *Evidence upon Which Germany Relies*: Germany relies selectively upon exhibits that the parties to this action have submitted, in particular the Joint Statement, the Executive Agreement, and the Foundation Law. Germany has submitted certain other exhibits supporting its position.

The findings of the Federal Ministry of Finance that the Defendants have fulfilled their commitment to the Foundation in full were summarized by Hans Eichel, the head of the supervisory authority over the

Foundation, in his letter of July 17, 2002 to Secretary of State Powell. He concluded, "Your Government, Mr. Secretary, has recognized as legitimate the interest of German companies in all-embracing and enduring legal peace. I am convinced that the Government of the United States will be able to defend German companies in United States courts as promised under the Executive Agreement of July 17, 2000." (Germany's Brief Exh. A).

Exhibit B of the German Brief constitutes the Remarks of Randolph Bell, Special Envoy for Holocaust Issues, U.S. Department of State, delivered at the June 14, 2002 Konrad Adenauer Sifting Dialogue. He refers to the "Foundation's total endowment of DM 10.1 billion," and, referring to the concept of "all embracing legal peace," . . . "it amounts to a commitment on the U.S. side, where our bilateral Executive Agreement requires, to file Statements of Interest in U.S. courts seeking the dismissal of civil actions arising out of the Holocaust era. This is an obligation the United States takes extremely seriously . . . ". (Germany's Brief Exh. B).

Exhibit C to the German Brief quotes what it characterizes as the erroneous statement of Professor Neuborne made during oral argument of this case before the Court of Appeals on April 26, 2006. Specifically, Professor Neuborne states that except for the courts of the United States "I know of nowhere else to go at this point [on behalf of Plaintiffs]," when in fact there are remedies available under German law, including the assistance of a German Administrative

Court, to challenge the decision of the supervisory authority that no additional funds are owed.

Exhibit D is Professor Neuborne's October 24, 2001 letter to Judge Weinstein in the *Ukranian National Association* case, in which he states, "[i]f judicial review of the activities of the German Foundation is deemed necessary by aggrieved parties, the German legal system is unquestionably the appropriate forum." (Germany's Brief Exh. D).

VIII. Discussion

A. *Status of Joint Statement*: One of the questions that the Court of Appeals left to this court was: "is the Joint Statement, or part of the Joint Statement, enforceable as a private contract?" Plaintiffs, of course, contend that it is, stating "[t]he document embodies *both* a private settlement agreement between and among the 36 private signatories, *and* a set of nonbinding undertakings by eight nations that operaté as conditions precedent to the enforceability of the private bargain. Since all such conditions precedent have been fully performed, defendants' financial promises are legally binding." (Pls.' Mem. at 4). Plaintiffs note that the German companies have received the full benefit of the bargain, namely, "legal peace," which is defined as: i) dismissal with prejudice of more than 60 WWII-related cases pending in the United States and ii) adequate protection against future similar litigation in the United States. Plaintiffs having performed their part of the bargain,

Defendants should be subject to a legal action to perform theirs.

Plaintiffs recognize that the Joint Statement is an unusual hybrid with both private and state parties. They could find but a single international document to be signed both by private parties and by sovereigns – the 1838 Treaty of Buffalo Creek, Jan. 5, 1938, 6 Stat. 550, an Indian land treaty signed by the United States, several Indian tribes, and joined by two private land speculators, who bound themselves to purchase certain Indian lands. The land speculators do not appear to have signed the treaty. *See United States v. New York Indians*, 173 U.S. 464 (1898) (discussing terms of treaty); *New York Indians v. United States*, 170 U.S. 1 (1898) (same).

Plaintiffs point to the London Debt Agreement of 1953, which involved close cooperation between governments and private creditors in restructuring post-war Germany's external debt, but which was not formally signed by any private parties. The private rights acquired by German companies under the London Debt Agreement to be free from WW II-related litigation were judicially enforced against Plaintiffs for almost a half century, *see, e.g.*, *Iwanawa* and *Burger-Fischer* cases. Similarly, Plaintiffs argue, the Joint Statement should be legally enforceable by the private signatories.

Plaintiffs cite the Warsaw Convention, 137 L.N.T.S. 11 (1929), an international agreement signed solely by sovereign nations governing, *inter alia*,

liability for damages suffered during international air travel. The Convention set a ceiling of $8,300 on such damages, and in 1965, the United States threatened to withdraw unless the ceiling was raised. A consortium of private international airlines entered into a private written agreement waiving the $8,300 ceiling and replacing it with a ceiling of $75,000, thus mollifying the United States. The privately generated codicil to the Warsaw Convention is legally binding on the signatory airlines.

Plaintiffs argue that just as the private agreement executed in relation to the Warsaw Convention and the London Debt Agreement generated legally binding and judicially enforceable law, so do Defendants' promises in the Joint Statement. The argument can be summarized as follows:

> In fact, the Joint Statement, a unique public/private hybrid, contains *both* a private settlement agreement between and among 36 private signatories, *and* a series of non-binding political undertakings by eight sovereigns that function as conditions precedent to the enforceability of the private bargain. *See O'Leary v. Grace/Newark Hous. Ltd. P'ship.*, 31 Fed. Appx. 784, 786 (3d Cir. 2002) ("Under basic contract law, a condition precedent is 'an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.'")

(Pls.' Mem. at 51, 52).

Plaintiffs take note of the Court of Appeals statement that "[m]uch of the text of the Joint Statement . . . supports the German Foundation Industrial Initiative's view [that the document is nonbinding]." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 385-86 (3d Cir. 2006), observing that "[p]laintiffs have no quarrel with the Third Circuit's sensible observation that a judicial effort to enforce the forward-looking political commitments made by eight government signatories would violate the Political Question doctrine . . . but the fact that a court is not empowered to compel performance of a given condition precedent does not detract from the legally binding nature of the underlying contract, once the condition precedent has been satisfied." (Pls.' Mem. at 152-53).

Plaintiffs challenge the statement of State Department official, Ronald Bettauer, included in a 2000 address he delivered at a conference on the Recent Holocaust Claims Resolution: "It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states We therefore developed a document that set forth political rather than legal commitments . . . " (Pls.' Mem. at 53).

Plaintiffs observe that Bettauer's statements are pure hearsay. Further, he was not qualified to opine on the legal status of the private bargain between and among 36 private signatories. Nor was he entitled to speak on behalf of any of the private signatories or the Claims Conference or, in fact, on behalf of

the diplomatic representatives of the six nations with substantial victim populations that signed the Joint Statement.

Finally, Plaintiffs contend that "both the text of the Joint Statement, and the objectively expressed intentions of the private signatories, demonstrate conclusively that the financial undertakings recited in paragraph 4 of the Joint Statement were intended by the private signatories to be legally binding. Indeed, the objective evidence that the private signatories intended defendants' financial promises in paragraphs 4(a), and 4(d) to become legally binding upon satisfaction of the conditions precedent spelled out in paragraphs 4(b), 4(c) and 4(h), is so overwhelming that summary judgment on the issue must be entered for the plaintiffs." (Pls.' Mem. at 59), Plaintiffs cite in particular the language of Secretary Eizenstat in his Declaration dated January 18, 2007, in which he states that the "carefully negotiated" language attests that the language governing Defendants' interest obligations during the deferral period was intended to create a minimum interest figure, not a ceiling. (Eizenstat Decl. Para. 4). This, however, goes into the meaning of Para. 4, the subject of a subsequent section of this opinion.

The court has reviewed the entire record as it relates to the status of the Joint Statement. The question whether the Joint Statement contains within it a legally enforceable contract involves, first, an analysis of the Joint Statement, read in conjunction with the two other instruments constituting the

Berlin Accords, namely, the Executive Agreement and the Foundation Law. On July 17, 2000, the day the Joint Statement was signed, the United States and Germany entered into the Executive Agreement. Shortly thereafter, the Bundestag enacted the Foundation Law that, among other things, established the Foundation as a German sovereign instrumentality and the "exclusive remedy and forum" for resolution of asserted claims against German companies arising out of the Nazi-era and World War II. Each document refers to the commonly – held objective of "all – embracing and enduring legal peace" for German companies.

Para. 4(d) of the Joint Statement, the critical undertaking in these cases, contained the following provisions:

> i) the DM 5 billion contribution of German companies shall be due and payable to the Foundation and payments from the Foundation shall begin once all lawsuits against German companies arising out of the Nationalist Socialist era and World War II pending in U.S. Courts including those listed in Annex C and D are finally dismissed with prejudice by the Courts.
>
> ii) The initial portion of the DM 5 billion German Government contribution will be made available to the Foundation by October 31, 2000. The remainder of the German Government contribution will be made available to the Federal Foundation by December 31, 2000.

> iii) Contributions from the German Government will begin earning interest for the benefit of the Foundation immediately upon being made available to the Foundation. The German Government may advance some of its contributions to the partner organizations for certain start-up costs before the lawsuits are finally dismissed.
>
> iv) The German companies will make available reasonable advanced funding to provide appropriate publicity of the upcoming availability of Foundation benefits.
>
> v) Germany (sic) company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

The general rule under international law is that international diplomatic documents such as an international accord or treaty (and related instruments thereto), do not create privately enforceable rights. *See, e.g., Khalid v. Bush*, 355 F. Supp. 2d 311, 327 (D.D.C. 2005). To determine whether an international diplomatic document such as the Joint Statement may be an exception to the general rule and create privately enforceable rights, courts must look first to whether such a right is explicitly stated, and then to the language of the document as a whole. "When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan*

Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring). If the document is clear, there is no need to consider anything outside its four corners, *see, e.g., Frolova v. Union of Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985).

The Joint Statement does not contain an explicit statement that it is privately enforceable. Examination of the document as a whole, particularly when considered in conjunction with the Executive Agreement and the Foundation Law, does not disclose an intent to provide a right of action. In fact, when considered in conjunction with the Foundation Law, there is disclosed an intent, if not mandate, that disputes such as those that have arisen in this case be resolved by German authorities.

The Joint Statement, a step in the diplomatic resolution of the Nazi era claims against German companies, sets forth the steps that the signers of the Joint Statement were expected to take, e.g., those set forth in Para. 4(d) quoted above. The phrases of the Joint Statement that might be deemed to refer to future litigation rejected that possibility. Para. 11 of the Preamble states: "[T]he establishment of the Foundation does not create a basis for claims against the Federal Republic of Germany or its nationals." Para. 9 of the Preamble expresses the objective of all signatories that there be "all embracing and enduring legal peace" for German companies. The Joint Statement contains none of the provisions that usually accompany an agreement that contemplates legal action to enforce the agreement, such as disputes

clauses, choice of forum clauses, or choice of law clauses.

The very title of the instrument – Joint *Statement* – negates the creation of a legally binding agreement. In international practice, governments may make "joint statements" or "declarations" that summarize a conference and express mutual intentions but do not establish legal obligations enforceable in any domestic court. The United States has signed numerous such documents that have been described as "not a treaty or agreement. . . ." The International Law Commission, when developing the Vienna Convention on the Law of Treaties, excluded such documents from its definition of "treaty" because they are non-binding. *See* Report of the International Law Commission to the General Assembly, 1958 2 Y.B. Int'l Law Comm. 96-97 (1959). Note may be made of the fact that the Executive Agreement was signed by officials of the United States and German Governments accredited to enter into agreements binding on their governments. At the same signing ceremony, the United States and Germany had the Joint Statement signed by other people who were not so accredited.

That the Joint Statement speaks the language of diplomatic expectations is further evidenced by the fact that its Para. 4(b) provides that the United States and German Governments "will sign an Executive Agreement. . . . and [s]uch agreement contains the obligation undertaken by the United States to assist in achieving all-embracing and enduring

legal peace for German companies." Other paragraphs of the Joint Statement provide for the execution of the Executive Agreement, and still other paragraphs impose obligations upon Central and Eastern European States and Israel. In all this, there is nothing to suggest that the private lawyer signatories can extract from the comprehensive Joint Statement selected provisions for judicial enforcement.

The language of the Joint Statement is not that used to create enforceable obligations. The signatories are "participants," not "parties." After the Preamble, the signatories "declare" rather than "undertake" or "agree." The Para. 4(d) interest provision does not use the word "pay," but describes an anticipated result. It does not specify how the expected result is to be achieved; there is no reference to an interest start or end date or mention of a rate of interest.

Defendants contrast the language of the Executive Agreement with that of the Joint Statement. Unlike the Joint Statement, which avoids all "agreement" language, the Executive Agreement is replete with language of "agreement" from its title to constant use of the terms "parties," "agree," and "agreed."

Plaintiffs repeatedly contend that their lawyers would never have dismissed their class-action complaints in the United States courts relying only on a statement of principles, as distinguished from a legally enforceable contract. This argument has a

surface plausibility, but it evaporates if one considers the Joint Statement in conjunction with the Berlin Accords in their entirety.

The entire negotiating process leading up to the Berlin Accords did not rely upon actions the United States courts would take. Rather, all the claimant participants relied on the power and persuasiveness of the United States and German Governments to bring the contending parties into agreement and to ensure that any agreement arrived at would be adhered to.

While the Joint Statement did not create legal, privately enforceable obligations, it provided that the United States and Germany would enter into an Executive Agreement (Para. 4(b)), and it provided that the German Bundestag would adopt the Foundation Law (Para. 3).

Article 1(3) of the Executive Agreement states that Germany, not the United States or its courts, is to supervise the Foundation:

> The Federal Government of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

Further, the Executive Agreement provided that Germany would adopt the Foundation Law (which

was described in some detail in the Executive Agreement, Annex A). The Foundation Law provided that the "[c]ontributors to the Foundation's capital fund shall be companies joined together in [the Foundation Initiative of German Industry] and the Federal Government," (Law §3(1)), and that the German Companies contribution would be "Five billion deutschmarks." (*Id.* § 3(2)1). The Law also provided that "[t]here is no obligation of the donors to make supplementary payments". (*Id.* § 3(3). The Law also provided for an international Foundation Board of Trustees and for oversight of the Foundation by German Government ministries. (*Id.* §8). As the Federal German Republic pointed out in its amicus brief, if a claimant is dissatisfied with the action of the German Government ministries there are remedies available under German law, including the assistance of a German Administrative Court, to challenge the decision of the supervisory authority.

The remedies provided to any objectors by the Executive Agreement and the Foundation Law were those arrived at through a lengthy negotiation process. Just because the Plaintiffs cannot rely upon the Joint Statement as a private contract enforceable in United States courts, does not mean that they foolishly surrendered valuable rights with no means of enforcing the benefits that were the *quid pro quo*. The power and prestige of the United States and the Federal Republic of Germany stood ready to protect those rights, and mechanisms were available within

the German Government in which any controversy over those rights could be resolved.

The language of the Joint Statement and the context in which it arose establish that it is a political document and not a contract conferring on Plaintiffs the right to bring suit in United States Courts.[8] Consequently, Defendants' motion to dismiss the *Gross* case will be granted.

B. *Gross Case Motions*: Plaintiffs in the *Gross* and *Schwartz Lee* cases have moved for summary judgment, supporting their motion with declarations and extensive documentation. Reliance is also had on the declarations and documentation submitted in support of the motion for partial summary judgment that Plaintiffs in the *Schwartz Lee* case filed. In response to these motions, Defendants filed declarations and extensive documentation. These all relate to the amount of interest and other payments that Plaintiffs claim the German companies owe pursuant to the Joint Statement.

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[8] Plaintiffs cite certain international agreements as precedents for their contention that the Joint Statement is a judicially enforceable contract. None of these agreements are analogous to the Joint Statement and the other instruments constituting the Berlin Accords.

Plaintiffs seek to hold Defendants liable on account of the statement that GEFI's counsel, Mr. Witten, made to the court when seeking dismissal of a class action: "The money will be there, your Honor." Such a representation does not convert the question as to what "money will be there" into one to be resolved by an American court rather than the German authorities.

If the court is correct in its holding that the Joint Statement confers no rights upon Plaintiffs that are enforceable in courts of the United States, the court should stop here and leave these weighty issues to the German authorities. However, because a higher court may disagree with this one, the court will address the question of the amount of interest, if any, that Defendants owe if the Joint Statement is viewed as a legally enforceable contract.

Defendants' motion was a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Rule 12(b) provides that if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Once the court decides to convert a 12(b)(6) motion into one for summary judgment, the requirements of Rule 56 apply. *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

Plaintiffs were not advised 10 days before the hearing on the pending motions that the court intended to convert Defendants' Rule 12(b)(6) motion into a Rule 56 motion, a step it decided to take after argument and after reviewing the vast and all-encompassing volume of evidence that all parties have submitted. The arguments proceeded as if Defendants had moved for summary judgment, and in view of the intimate familiarly of each party with the case, none will suffer prejudice if the court converts Defendants' motion to dismiss in the *Gross* case to a Rule 56 motion. Thus cross-motions for summary judgment are to be decided in the *Gross* case.

1. *Summary Judgment Standards*: A grant of summary judgment is proper when the moving party has established that there is no genuine dispute of material fact and that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court should view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor. *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005).

To prevail on a motion for summary judgment, the non-moving party must show specific facts such that a reasonable jury could find in that party's favor, thereby establishing a genuine issue of fact for trial. *See* Fed. R. Civ. P. 56(e). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla." *Hugh*, 418 F.3d at 267 (citing *Anderson*, 477 U.S. at 251).

2. *Joint Statement Ambiguity*: The parties are in agreement that, whether one applies German or American law, the construction of a contract begins with the text. An unambiguous text with a "plain meaning" cannot be altered by extrinsic evidence. *American Cyanamid Co. v. Fermenta Animal Health Co.*, 54 F.3d 177, 181-82 (3d Cir. 1995). An unarticulated subjective intent by one of the contracting parties to depart from the text's generally accepted

meaning is universally ignored, because in interpreting a contract, the primary objective of the court is to derive the objective intention of the parties at the time the contract was made. *See, e.g., Halper v. Halper*, 164 F.3d 830, 842 (3d Cir. 1999) ("The undisclosed subjective intent of a participant in a transaction cannot be used to alter the intent clearly manifested in the documents to which he subscribed.").

In the present case, each party contends that, read in the context of the entire Joint Statement, the concluding sentence of Para. 4(d) of the Joint Statement has a plain meaning and is unambiguous: "German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM."

Plaintiffs argue that the plain meaning of the term "at least" connotes a minimum, which cannot possibly be construed as a floor. Nor can the word "interest" really mean "additional principal," as Defendants contend. Citing the Oxford English Dictionary (2nd ed. 1989), Plaintiffs note that "at least" is "a qualifying phrase, attached to a quantitative designation to indicate that the amount is the smallest admissible," and "interest" is defined as "money paid for the use of money lent (the principal), or for forbearance of a debt, according to a fixed ratio."

Referring to the language "before and after [the funds] delivery to the Foundation," Plaintiffs contend that this was intended to assure GEFI that if the deferral period ended earlier than six months, they would receive credit toward the DM 100 million floor for interest earned on the funds "after" their earlier than anticipated transfer.

Defendants are equally insistent that the language of Para. 4(d) is unambiguous, and, consequently "the Court can, and therefore must, resolve this case on the basis of the language of the Joint Statement" (Defs.' Mem. in Opp'n 2). They note that there is nothing in the critical sentence of Para. 4(d) (or elsewhere) that speaks of interest to compensate for any "delay" from any point in time to any other. There is no statement of when interest would begin to accrue or cease to accrue; nor is there a provision for a rate of interest or a designation of the principal on which the interest was payable. It will be recalled that on July 17, 2000, GEFI was engaged in the continuing, difficult process of seeking funds and commitments to reach the DM 5 billion goal by the time legal peace had been achieved through the dismissal with prejudice of the lawsuits in the United States.

Defendants do not dispute that "at least" are floor words, not ceiling words, but contend that as a matter of ordinary usage, an obligation to pay "at least" one dollar is not an obligation to pay anything more than a dollar. Further, they argue that "at least"

must be read in conjunction with the words "before and after." These words, according to Defendants, mean that "at least 100 million DM" could be earned over the whole period (both while contributions were being collected "before" their transfer to the Foundation, and by the Foundation "after" receiving the money).

Properly construed, Defendants argue: "The only steps to be taken with respect to the contribution by German companies were to pay DM 5 billion to the Foundation 'once all lawsuits against Gelman companies arising out of the National Socialist era and World War II pending in U.S. courts . . . [were] finally dismissed with prejudice by the courts,' and to arrange the timing so as to allow the accrual of 'at least 100 million DM.' That amount could have been earned entirely by the Foundation itself, after receipt of moneys from German companies. Nothing in Paragraph 4(d) required that *any* amount of interest be earned 'before' delivery of the funds to the Foundation, as long as 'at least 100 million DM' was earned in the period 'before and after' delivery." (Defs.' Mem. in Supp. 33).

Because the German companies had contributed to the Foundation DM 5 billion in "principal" plus DM 100 million in "interest," they have met the obligations of Para. 4(d) in accordance with its plain meaning and, according to Defendants, it follows that the *Gross* complaint should be dismissed.

Despite the persuasive arguments of each party, the court is not convinced that the "interest" language of Para. 4(d) has a plain meaning. Rather, that language, even in the context of Para. 4(d) in its entirety, is the ultimate in ambiguity.

Consequently, it is necessary to examine the circumstances in which the language was drafted in order to determine its meaning. Having completed such an examination, the court concludes that Plaintiffs' proposed construction of Para. 4(d) finds no support in the record, and that if this court were empowered to construe the Joint Statement, it would enter summary judgment for the Defendants.

The obligations of the German companies (and also of the German Government) to make payments to the Foundation were determined at three critical stages: i) the December, 1999, negotiations that led to the commitment of the German Government to pay DM 5 billion and the commitment of the German companies to pay DM 5 billion to the Foundation; ii) the March, 2000 negotiations that led to the German companies agreeing to pay an extra DM 100 million, and iii) the June-July, 2000 negotiations that led to the Berlin Accords.

3. *The December, 1999 Understanding*: There has already been described the intense negotiations, shepherded and prodded by Secretary Eizenstat and Count Lambsdorff that culminated in the determination of the amount to be paid to the Foundation. (See Background at 11-17). In early December, Count

Lambsdorff told Secretary Eizenstat that "whatever Schroeder might be saying about sticking to 8 billion marks, if I could organize a unified front from the victims for a settlement of 10 billion marks, the chancellor would rethink his position." (*Imperfect Justice* at 255-56).

Secretary Eizenstat then met with the key class action plaintiffs' attorneys – Hausfeld, Weiss, Fagan and Neuborne, and with Singer of the Claims Conference. All but Hausfeld agreed to accept DM 10 billion. He insisted on an additional DM 500 million. After Secretary Eizenstat agreed to try to raise additional funds from American corporations which had had affiliations with German World War II companies, all the attorneys agreed to settle with the Germans for DM 10 billion. (*Imperfect Justice* at 256)

On December 12, 1999, Secretary Eizenstat informed Count Lambsdorff that he had a firm figure of DM 10 billion from the lawyers that he could take to Chancellor Schroeder. The Chancellor wanted a letter from President Clinton confirming the lawyers' agreement accepting the DM 10 billion and guaranteeing to end all legal action. (*Imperfect Justice* at 256). President Clinton sent such a letter to Chancellor Schroeder on December 13. It read in part:

> Deputy Secretary Eizenstat was intensively engaged this past week with the plaintiffs' attorneys with whom he has dealt to move them closer to the German offers. On Sunday, he reported to Count Lambsdorff that they, the Conference for Jewish Material

> Claims Against Germany, the Central and Eastern European Governments and the Government of Israel would agree to settle at DM 10 billion . . . This counteroffer is a firm commitment for settlement of which we both could be proud.

At this point, once again Mr. Hausfeld sought to squeeze more from the German side. On December 13 he wrote to Count Lambsdorff setting forth terms in total departure from those that had been agreed upon with Secretary Eizenstat and communicated to Count Lambsdorff and Chancellor Schroeder[9]:

> 1. The German side agrees to a 10 billion DM present value settlement, excluding costs of administration, distribution, notice and fees.
>
> 2. That there be firm commitment from non-German firms which used forced labor during World War II in an amount no less than 1 billion DM. (This would be a parallel mirror fund to be added to the 10 billion DM German commitment).
>
> 3. The reasonable administrative, distribution, notice costs and fees be paid by the German side over and above the 10 plus 1 billion DM commitment from German and

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[9] Beneath Mr. Hausfeld's signature there also appeared the typewritten names: Martin Mendelsohn, Michael Smorodsky, Robert Lieff, Arnold Levin, Republic of Poland, Czech Republic, Republic of Belarus and Ukraine.

non-German companies using forced labor during World War 11.

On December 14, 1999, Chancellor Schroeder responded to President Clinton accepting the DM 10 billion capped settlement and categorically rejecting Mr. Hausfeld's demands. He stated that "we have decided to increase the financial endowment of the Federal Foundation to a total of 10 billion DM," and further:

> Two aspects were particularly important for this decision: First of all, the amount of 10 billion DM which will be furnished by the German side is the final amount. All contributions of the Federal Foundation are included. Further demands, as they were presented by attorneys for the plaintiffs yesterday, are being rejected by the Federal Government in accordance with the U.S. government.
>
> The second central argument for your proposal are the substantial improvements concerning legal closure which were reached during the last few days. I appreciate very much the promise made by the U.S. Government to point to the foreign-policy interests in all pending and future litigation and to use its influence to reach a dismissal action. The same goes for the willingness of the U.S. Government to give a Statement of Interest which is independent from the attitude of the plaintiffs. I am by the way proceeding on the assumption that this

> consensus will take away the basis for legislative and administrative actions against German enterprises and that the U.S. Government will enforce the annulment of the actions on the Federal and state level.
>
> . . .
>
> The Federal Government went to the limits of what was possible in order to achieve [agreement]. Therefore it will decisively reject any further demands. I am also aware of the substantial efforts of the U.S. Government. I am very grateful for the special involvement in this cause to you, your government and especially to our special envoys, Stuart Eizenstat and Otto Graf Lambsdorff.

Thus, agreement between the heads of state for a capped fund of DM 10 billion and providing for legal peace was memorialized in President Clinton's December 13 letter to Chancellor Schroeder and in Chancellor Schroeder's December 14 response. This was formally announced and accepted by all parties to the negotiations on the occasion of the formal signing ceremony that took place on December 17, 1999.

There can be no question that the letter between the two heads of state constituted an understanding that incorporated the following elements:

> i) " . . . the amount of 10 billion DM which will be furnished by the German side is the final amount"

> ii) "All the other costs related to the Federal Foundation are included."
>
> iii) "Further demands, as they were presented by attorneys for the plaintiffs yesterday, are being rejected by the Federal Government in accordance with the U.S. government."
>
> iv) "The Federal Government went to the limits of what was possible to achieve [agreement]. Therefore it will decisively reject any further demands."

Secretary Eizenstat resisted Mr. Hausfeld's after the fact effort to sweeten the firm agreement of the heads of state as embodied in the exchange of letters:

> Disagreement about the letters broke out even before the ink was dry. One was over legal fees. Hausfeld argued that the fees for the lawyers had to be over and above the 10 billion. The Germans balked 10 billion was 10 billion. My solution was to bury the legal fees in the amount we allocated for administrative fees. For once, Hausfeld was positive. "God bless you, and thank you for not forgetting us," he said. Singer added, "We thank you and the Jewish people thank you."

(*Imperfect Justice* at 258).

Mr. Hausfeld is not put down for long. Despite the fact that Plaintiffs' own evidence establishes conclusively that in December, 1999, the German side, both the Federal Government and the German companies, in exchange for legal peace, agreed to the

payment of DM 10 billion to the Foundation and to nothing more than the payment of DM 10 billion. The *Schwartz Lee* Plaintiffs, represented by Mr. Hausfeld, contend that the German companies agreed to pay interest on their DM 5 billion share from December, 1999, and the *Gross* Plaintiffs contend that the German companies' 1999 agreement incorporated an understanding to pay interest after the July 17, 2001 signing of the Joint Statement.

These contentions have absolutely no basis in the record and are supported only by two distortions of the record. The first distortion is contained in Mr. Hausfeld's Declaration. He includes as an exhibit a copy of his December 13, 1999 letter to Count Lambsdorff setting forth his demands that were rejected in their totality in Chancellor Schroeder's December 14, 1999 letter. Mr. Hausfeld omits from his Declaration a copy of Chancellor Schroeder's letter and apparently believes he can make it disappear by including in its stead a copy of an April 3, 2000 letter from a Special Assistant to the President stating that the December, 1999 exchange of letters between the heads of state did not constitute "an international agreement or a statement of the existence of an international agreement." That letter, of course, has no relevance in the present case and does not achieve Mr. Hausfeld's purpose of making the Chancellor's December 14 letter disappear and become of no effect.

The second ploy which Plaintiffs' counsel use to try to expand the December, 1999 commitment of the

German side is use of quotation from Secretary Eizenstat's book:

> I then engaged in what I could only call creative accounting. I persuaded Lambsdorff and Gentz to add interest that would be earned on the money while we were getting the cases dismissed and setting up the foundation that would now be one joint private sector – federal government organization. They ended up agreeing to pay at least 100 million DM in interest. But the most ambitious was my idea to create a "mirror image" fund for the dozens of American companies whose big German subsidiaries had employed slave labor. According to a 1943 Treasury Department list, the most celebrated names included Ford, General Motors, Gillette, IBM, and Kodak, among many others.

(*Imperfect Justice* at 254).

From this quotation one might infer, and Plaintiffs ask the court to infer, that Count Lambsdorff for the German government and Dr. Gentz on behalf of GEFI, had agreed to the payment of "at least 100 million DM in interest" "while we were getting the cases dismissed and setting up the Foundation." The *Gross* Plaintiffs in their Memorandum in support of their motion for summary judgment wrote, "Thus, the agreement to pay interest during the deferral period was in place on December 17, 1999." (Mem. at p. 20, n.27). Nothing could be further from the truth. Plaintiffs have grievously distorted Secretary Eizenstat's book (the pertinent chapters of which have been

incorporated in Mr. Eizenstat's Declaration and are a part of *Plaintiffs'* evidence on these motions).

In a December 1, 1999 letter, Chancellor Schroeder reminded President Clinton that he had already followed the President's recommendation contained in his November 13 letter and increased the German offer from DM 6 billion to DM 8 billion, warning that if that offer were declined the Foundation plan would probably collapse. (*Imperfect Justice* at 253). Secretary Eizenstat's reaction was, "so I needed to line up the victims' side quickly to agree to a deal for 10 billion DM and confirm for the Germans that it would really settle the wartime claims once and for all." (*Id*). With the German side still at DM 8 billion, Secretary Eizenstat then advanced the "creative accounting" concept: "I then engaged in what I could only call creative accounting. I persuaded Lambsdorff and Gentz to add interest that would be earned on the money while we were getting the cases dismissed and setting up the foundation." (*Id.* at 254). But that would have been interest on DM 8 billion.

Immediately thereafter, Secretary Eizenstat attempted and failed to obtain contributions from American corporations, which was part of the "creative accounting" scheme. (*Id.* 254-55). Having failed to obtain American company contributions, Secretary Eizenstat acknowledged that his "creative accounting" proposal was dead: "All my creative accounting still could not bridge the gap, with the Germans stuck at 8 billion and the lawyers at 11 billion." (*Id.*, at 255). Thus ended the "creative accounting" notion. It

played no part in the subsequent chain of events that led to the approval of a final capped sum of DM 10 billion, with nothing more to be added.

Those subsequent events were: (i) Count Lambsdorff's approach to Secretary Eizenstat to inform him that Chancellor Schroeder might agree to a DM 10 billion final figure (*Id.* 255-56); (ii) Secretary Eizenstat's prevailing upon the lawyers to accept a DM 10 billion final figure (*Id.* at 256); (iii) Secretary Eizenstat's December 12 telephone call to Count Lambsdorff giving him the DM 10 billion firm figure (*Id.*); (iv) President Clinton's December 13 letter to Chancellor Schroeder (*Id.* 258); and (v) Chancellor Schroeder's December 14 letter to President Clinton that accepted the DM 10 billion and rejected everything else (*Id.*).

To suggest that Secretary Eizenstat's passing proposal of an interest payment on an DM 8 billion offer, one of many proposals he made during the course of the negotiations, somehow became a part of the final December 17, 1999 agreement on the capped DM 10 billion, defies all reason. To suggest that it somehow shaped the July 17, 2000 Joint Statement represents a further flight of fantasy.

The record establishes conclusively that as of the end of December, 1999, the total amount that the German Government and German companies had undertaken to pay to the Foundation was DM 10 billion at the time legal peace was obtained – nothing more.

4. *March 2000 "Interest" Agreement*: Once the total sum of DM 10 billion had been agreed upon, the representatives of the victims had to divide this sum among the various categories of claimants. At all times during this process, it was recognized that the total pie to be divided was DM 10 billion. The allocation process was painful, and eventually Secretary Eizenstat and Count Lambsdorff had to take a leading role mediating among the contending participants. As Secretary Eizenstat described it: "Whatever semblance of unity there had been among the Eastern Europeans, plaintiffs' attorneys, and Claims Conference in persuading the Germans to pay the maximum possible broke into open warfare as they tried to divide the pie. The process brought out the worst in everyone." (*Imperfect Justice* at 261).

There came a point in March 2000 when it appeared that the whole process would collapse unless an additional DM 100 million could be found for some of the claimants, and Count Lambsdorff and Secretary Eizenstat appealed to GEFI to provide that amount. It is GEFI's contention that in view of the representations as to the DM 10 billion cap that GEFI was making to contributors and potential contributors, it did not want any additional amount to be deemed an increase in the capped amount of DM 10 billion. Rather, even though it was in fact such an increase, GEFI undertook to pay it from interest it collected on funds received and was holding pending legal peace and to designate it "interest." This understanding is confirmed by the Declarations of three of

the persons who negotiated on behalf of GEFI and by a Declaration of Secretary Eizenstat's counterpart, Count Lambsdorff:

> Following the December 1999 agreement on a capped sum of DM 10 billion, the participants sought to reach agreement on an allocation of that amount for payments to the various categories of victims and all other programs and expenses of the Foundation. In March 2000, during these negotiations on allocation, it became apparent that political agreement among all participants in the talks could not be reached within the capped sum of DM 10 billion and that a further DM 100 million would be necessary to fund the allocated amounts. It was observed, however, that interest on the DM 10 billion capped amount could be used to meet the DM 100 million shortfall. In order to avoid affecting the previously agreed DM 10 billion capped sum, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest," and a consensus was reached to this effect.
>
> On 23 March 2000, the participants in the negotiations reached agreement on an allocation of the capped sum. That allocation agreement is attached to the Joint Statement as Annex B. It allocates DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern Europeans and DM 50 million in interest for insurance claims).

> I am not aware of any discussion involving GEFI or any German companies in which any amount of expected interest – other than the DM 100 million which was unanimously agreed to and set forth in Annex B to the Joint Statement – was mentioned, let alone agreed to. There certainly was no agreement on the part of GEFI or German companies that any transfer of interest in excess of DM 100 million was expected.

(Gentz Decl., Paras. 15-16) (Dr. Gentz was a de facto spokesman and negotiator for GEFI, and in that capacity he participated in the international negotiations).

> Second, in March 2000, during negotiations regarding how the DM 10 billion would be allocated among the different categories of victims and all other programs and expenses of the Foundation, it became apparent that political agreement could not be reached within the capped sum of DM 10 billion, and that further DM 100 million would be necessary to fund the allocated amounts. It was observed that interest on the DM 10 billion capped amount could be used to meet the DM 100 million shortfall. Thus, in order to avoid affecting the previously agreed DM 10 billion capped sum, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest." On March 23, 2000, the participants in the negotiations resolved the allocation issue (the result of which is attached to the Joint Statement as Appendix B), allocating

> DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern Europeans and DM 50 million in interest for insurance claims).
>
> I am not aware of any direct oral or written communication between any plaintiffs' lawyer and GEFI prior to the signing of the Berlin Accords regarding the subject of expected interest other than the DM 100 million which was unanimously agreed to and set forth in Annex B of the Joint Statement. At no point, did Burt Neuborne, Mr. Hausfeld, or their colleagues communicate to GEFI the theories regarding interest found in their briefs and declarations in this litigation, for example, the "deferral period" theory. GEFI never agreed to any of the interest theories Plaintiffs' counsel now put forward.
>
> As next described, the content of discussions regarding interest and the history of the drafting of the Joint Statement demonstrate that while Deputy Secretary Eizenstat made certain proposals relating to interest, GEFI rejected those suggestions, and Deputy Secretary Eizenstat acquiesced in GEFI's position.

(Witten Decl. at Paras. 9-11) (Mr. Witten was lead counsel for GEFI during the negotiations that lead to the Berlin Accords).

> I understand that by the end of March 2000, the parties recognized that an additional DM

> 100 million was needed to satisfy all of the parties to the negotiations. To resolve the allocation problem, GEFI eventually agreed that it would collect the funds in a manner that would ensure that an additional DM 100 million would be available to cover the agreed allocation. That resolution to the allocation issue is reflected in Annex B to the Joint Statement. It allocates DM 10 billion plus precisely DM 100 million in interest (DM 50 million in interest for slave and forced labor payments to Central and Eastern Europeans and DM 50 million in interest for insurance claims).
>
> In order to avoid affecting the previously agreed DM 10 billion capped sum, also being confirmed both by President Clinton and Chancellor Schroeder, GEFI and the German Government took the position that the additional DM 100 million be designated as "interest," and a consensus was reached to this effect.

(Kohler Decl., Paras. 17-18) (Dr. Kohler chaired the legal working group of GEFI).

> When it became clear that my American counterpart had incurred certain verbal obligations with the two leading partners, the Polish Government and the World Jewish Congress, which could be only matched by raising the Foundation Initiative's contribution by 100 Mio. DM, after long and arduous talks the Foundation Initiative agreed under the proviso that this additional amount did

not enter into the principal of the promised amount in public. This was the genesis of the word "interest", in reality covering the fact that so far the total amount of 10 bn. DM was not longer capped. So the interest was in reality no interest, which does not preclude the fact that once the sum was deposited in the Foundation's Account, it generated a much higher interest than this sum and, as a matter of fact, the Future Fund of the Foundation is meant to be financed perpetually from interest earned.

In regard to that issue, on April 19, 2000, I wrote the following in a letter to Deputy Secretary Eizenstat: "In December 1999 the companies of the German Foundation Initiative agreed to do everything to contribute the amount of 5 billion DM to the Foundation capital, and in March this year they agreed to a specific allocation of further 100 Mio. DM generated by interest. Although the Initiative's difficulties raising this substantial amount are well known and have been deplored by the German Chancellor and myself publicly, I have no doubt that the Initiative will finally succeed. The Initiative, however, has always underlined that it will turn its contribution over to the Foundation only when the class action suits have been dismissed, which is hopefully the case well before the end of the year." My personal hope did not, however, become the basis for assumption of an interest obligation by the German companies.

(Lambsdorff Decl., Paras. 12, 13) (Count Lambsdorff was Secretary Eizenstat's German counterpart and worked with him to obtain the extra DM 100 million that was needed to prevent the Foundation project from collapsing).

There is no evidence whatsoever to contradict these declarations. In their declarations, Count Lambsdorff, Dr. Gentz and Mr. Witten describe meetings with Secretary Eizenstat in which the DM 100 million arrangement was discussed and assumed to be binding as they negotiated other issues. In his own declaration, Secretary Eizenstat does not challenge the March, 2000 understanding as described by Messrs. Lambsdorff, Gentz, Witten and Kohler. They stand unchallenged.

Thus, as of the end of March, 2000, the obligation of the German companies was simply to pay to the Foundation the sum of DM 1.5 billion. This, as of that date, establishes the meaning of Para. 4(d) of the Joint Statement. Whether "at least" is a ceiling or a floor is a non-issue. The so-called "interest" in the amount of DM 100 million was in fact, as Defendants contend, an addition to the original capped figure of DM 10 billion.

5. *Post-March, 2000 Negotiations*: Plaintiffs contend that GEFI agreed in Para. 4(d) of the Joint Statement to pay interest at 4% on any unpaid balance on GEFI's DM 5 billion principal obligation from and after July 17, 2000 (and perhaps from and after December 17, 1999), and to pay over to the

Foundation all interest earned on the approximately 6000 contributions received from non-members of GEFI.

It has been determined that there is no evidence that interest is owing from December 17, 1999, and that Plaintiffs' claim that such interest is owing is based upon a distortion of the record. It has also been determined that the only obligation GEFI incurred to pay more than DM 5 billion was incurred in March, 2000, when, to save the Foundation project, GEFI agreed to pay an additional DM 100 million, calling it "interest" to avoid appearing to the public and contributors that they had breached the DM 10 billion cap that had been so widely publicized. If more is owing, GEFI must have agreed to it between March and July 17, 2000.

During that period, Secretary Eizenstat, to his credit, did his utmost to prevail upon GEFI to agree to expand the then DM 5.1 billion cap in order to ensure larger payments to the victims of the Nazi-era atrocities. In effect, he was attempting to achieve part or all of the objectives that Mr. Hausfeld sought in his December 13, 1999, letter to Count Lambsdorff, objectives that were categorically rejected in Chancellor Schroeder's December 14, 1999 letter to President Clinton.

Drafts of a Joint Statement were prepared and exchanged between GEFI and United States Government representatives in which the United States Government sought to expand GEFI's payment

obligations. GEFI rejected each proposal. These drafts, exchanged during the period March 16, 2000 and June 28, 2000, are described in Mr. Witten's Declaration (see Appendix A to this opinion).

Mr. Witten describes a critical June 30, 2000 meeting he attended with Secretary Eizenstat, at which Secretary Eizenstat again sought, unsuccessfully, to persuade the German companies to generate interest in addition to DM 100 million, and to specify date as of which interest would begin to accrue. Mr. Witten rejected these requests, stating that "[the] German companies would not agree to transfer any funds until all cases had been dismissed; German companies had made a commitment to collect DM 5 billion and to earn DM 100 million interest; German companies had not made any other commitments." (Witten Decl. at Para. 13). Secretary Eizenstat pressed no further and "dropped his proposal and said he would as an alternative speak with Count Lambsdorff to see if the German Government's money (not the German companies' money) could earn interest." (*Id.*).

Secretary Eizenstat was more successful with the German Government and prevailed upon it to agree to pay its DM 5 billion share in two installments – one half by October 31, 2000 and one-half by December 31, 2000, even though legal peace had not been achieved. The funds would, of course, begin earning interest upon their payment to the Foundation. In light of this negotiation history, no reasonable jury could find that GEFI had agreed in the Joint

Statement to pay, upon dismissal with prejudice of all the United States lawsuits, more than DM 5.1 billion. The evidence that Plaintiffs produce does not create a material issue of fact.

Professor Neuborne's Declarations parallel those of Mr. Hausfeld and Mr. Weiss, stating "the parties agreed that DM 100 million interest minimum payable by the Initiative would include interest on both German Foundation funds retained by the Initiative during the deferral period pending transfer to the Foundation, and funds transferred to the Foundation prior to the expiration of the deferral period." (Neuborne Decl. Para. 84). Later, Professor Neuborne states, "aided by exhortations from President Clinton and Chancellor Schroeder, on December 17, 1999, the parties firmly agreed to the establishment of DM 10 billion *plus interest,* in return for the dismissal with prejudice of all pending litigation and the signing of an Executive Agreement providing protection against future litigation." (Neuborne Supp. Decl. Para. 16). (emphasis added). As the evidence cited above establishes, Professor Neuborne's statements are categorically in error. He offers no admissible evidence to support this. He and Mr. Hausfeld and Mr. Weiss recount what they demanded or were thinking during the negotiations. For example, Professor Neuborne states that "representatives of victims believed that the text of the Joint Statement assumed that interest would be earned on funds constituting the Initiative's DM 5 billion principal obligation: (a) during the deferral period; and (b) subsequent to payment to the

Foundation, but before substantial payments could be distributed by the Foundation." (*Id.* Para. 79). Mr. Weiss recounts, "Thus, the parties assumed that within approximately six months of the execution of the Joint Statement, the Initiative would place its DM 5 billion obligation into the Foundation, together with a guaranteed 'interest' payment of 'at least DM 100 million' accrued during the deferral period. The Foundation would then consolidate the combined total of DM 5.1 billion with the German Government funds already in the Foundation, plus the interest that had occurred on those funds, and so that all of the funds held by the Foundation would earn interest for the victims at 4% during the period needed to process claims." (Weiss Decl. Para. 16).

Beliefs and assumptions are not a substitute for evidence of what the parties actually agreed to. Professor Bazyler's article, upon which Plaintiffs rely, is rank hearsay. Moreover, he falls into the same egregious error into which Plaintiffs fell, citing page 254 of *Imperfect Justice* for the proposition that "at the November 13 [1999] plenary, [Secretary Eizenstat] persuaded the Initiative to commit to paying 'at least' DM 100 million in 'interest' during the period needed to secure the dismissal of cases pending in the United States.'" As described earlier in this opinion there was no such agreement and the proposals submitted at the November 13 plenary were superseded by subsequent negotiations, by the December 13 and 14 exchange of letters between President Clinton and Chancellor Schroeder, and the December

17, 1999, announcement of a capped payment of DM 10 billion. The balance of Professor Bazyler's article also exhibits a remarkable parallel to Plaintiffs' briefs, suggesting that he has abandoned his role as an historian and assumed that of a partisan. If he were acting as an historian he would have moved from page 254 and on to pages 255 *et seq.*, of *Imperfect Justice.*

Most interesting of all is Plaintiffs' reliance upon Secretary Eizenstat's one and one-half page Declaration. In the Declaration he incorporated Chapters 10-13 of his book and stated that sentence 7 of paragraph 4(d) of the Joint Statement:

> was intended to establish a minimum interest figure payable to the Foundation in connection with the deferral period needed to attain "legal peace" of the German Foundation Industrial Initiative's obligation to pay DM 5 billion to the Foundation.
>
> The language, which was carefully negotiated, was not intended to establish an interest ceiling, or to describe an addition to principal. It was highly contentious matter in negotiations and the understanding was carefully negotiated.

As should be abundantly clear from the foregoing sections of the opinion, the DM 100 million was a fixed sum that GEFI was obligated to pay to the Foundation, albeit from interest earned on funds collected. Whether the "at least" was a ceiling or a floor is a non-issue. What is so striking about

Secretary Eizenstat's Declaration is not what it states in its one and one half pages, but what it *doesn't* state. If the Declarations of Count Lambsdorff, Mr. Witten, Dr. Gentz and Dr. Kohler concerning the December agreement on the DM 10 billion capped amount, the March 2000, agreement on the payment by GEFI of an extra DM 100 million and the June-July, 2000 final negotiations of the Joint Statement are believed, there is absolutely no basis for Plaintiffs' claims of additional payments of interest. The Declarations of Mr. Hausfeld, Mr. Weiss and Professor Neuborne of their beliefs, expectations, and anticipations are not evidence contradicting the categorical statements of Count Lambsdorff, Mr. Witten, Dr. Gentz, and Dr. Kohler. Only Secretary Eizenstat, who was a party to the discussions with GEFI's representatives, is in a position to address these statements, and nowhere does he do so.

Chapters 10-13 of Secretary Eizenstat's book, *Imperfect Justice,* upon which this opinion draws heavily, are incorporated by reference in Secretary Eizenstat's Declaration and thus are evidence that Plaintiffs submitted. As far as it goes, the book is totally consistent with Defendants' view of the case. In fact, as shown above, it demonstrates the baselessness of Plaintiffs' claim that in December, 1999, Count Lambsdorff and Dr. Gentz agreed with Secretary Eizenstat to add the interest that would be earned on the money "while we were getting the cases dismissed and setting up the foundation." The book, however, does not address the March, 2000

agreement to supplement the DM 5 billion with an extra DM 100 million and, except for three sentences at p. 276, it does not address the lengthy negotiating process during which at least 10 drafts of the Joint Statement were exchanged and Secretary Eizenstat vigorously sought to prevail upon GEFI to pay more than the DM 5.1 billion.[10]

Nor does Secretary Eizenstat's Declaration address these matters. Secretary Eizenstat is perhaps the only person in a position to refute the Defendants' account of the March and July, 2000 events, because he personally dealt with Count Lambsdorff and GEFI's representatives.

Count Lambsdorff, at the outset of his Declaration, confirms that as of December 17, 1999, there was universal agreement that the total contribution of the German side was DM 10 billion, with no room for future increases. This was a position with which Secretary Eizenstat obviously agreed, because during his efforts to "divide the pie" he proceeded on the

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[10] Those three sentences are consistent with Defendants' declarations:

> But Gentz's greatest concern was over turning of German industry's requirement to pay its 5 billion DM share of the 10 billion DM settlement. To avoid delay, I had suggested a certain date, like January 1, 2001. The Germans had rejected my suggestion, and in a major major concession to them, I had reluctantly agreed that no payments would be required until all cases were dismissed.

Imperfect Justice at 276.

basis that he and Count Lambsdorff had only DM 10 billion to divide.

Count Lambsdorff recounted the circumstances leading to GEFI's agreement to pay an additional DM 100 million. Secretary Eizenstat had hit an impasse in allocating the DM 10 billion among the claimants and it became evident that he needed an additional DM 100 million to secure agreement among the contending claimants. Count Lambsdorff prevailed upon GEFI to provide the additional DM 100 million:

> . . . after long and arduous talks the Foundation Initiative agreed under the provision that the additional amount did not enter into the principal of the promised amount in public. This was the genesis of the word "interest," in reality covering the fact that so far the total 10 billion DM was no longer capped. So the interest was in reality no interest.

Mr. Witten described the same process in his Declaration. Dr. Gentz stated in his: "In March 2000, during these negotiations on allocation, it became apparent that political agreement among all participants in the talks could not be reached within the capped sum of DM 10 billion and that a further DM 100 million would be necessary to fund the allocated amounts. It was observed, however, that interest on the DM 10 billion capped amount could be used to meet the DM 100 million shortfall. In order to avoid affecting the previously agreed DM 10 billion capped sum, GEFI and the German Government took the position that the additional DM 100 million be

designated as 'interest,' and consensus was reached to this effect."

Dr. Kohler's Declaration was in accord. This agreement on GEFI's part to pay an additional DM 100 million and designate it "interest" is what was incorporated in Para. 4(d) of the Joint Statement. There was no agreement in March, 2002 to pay additional interest. Secretary Eizenstat was free to rebut these Declarations in his Declaration. He did not do so, and they stand unrebutted.

It is equally clear that during the negotiations of the final draft of the Joint Statement, every effort of Secretary Eizenstat to increase GEFI's obligation to pay interest in addition to the DM 100 million payment was rebuffed.

On April 19, 2000, Count Lambsdorff wrote to Secretary Eizenstat that "[i]n December 1999 the companies of the German Foundation Initiative agreed to do everything to contribute the amount of 5 billion DM to the Foundation capital, and in March this year they agreed to a specific allocation of further 100 M.O. DM generated by interest. . . . The Initiative, however, has always underlined that it will turn its contribution over to the Foundation only when the class action suits have been dismissed, which is hopefully the case well before the end of the year."

In his Declaration, Mr. Witten described in great detail his discussions with Secretary Eizenstat during which Secretary Eizenstat argued forcefully for an interest provision. He listed the numerous American

drafts that sought to include an interest provision in the Joint Statement and GEFI's consistent rejection of these drafts. He described a June 12, 2000 meeting with Secretary Eizenstat:

> In particular, on June 12, 2000, I attended a meeting hosted by Deputy Secretary Eizenstat at the U.S. Treasury Department in Washington, D.C. with representatives of the U.S. and German Governments. The attendees included Graf Lambsdorff, Dr. Manfred Gentz, who was the de facto spokesman for GEFI. At that meeting, the German side reconfirmed its longstanding position that German company payments to the Foundation would not be due until all cases were finally dismissed with prejudice. In response, Deputy Secretary Eizenstat said that plaintiffs' lawyers might object to this position but might be placated if the German companies agreed to pay interest on their DM 5 billion to the Foundation; and second to generate DM 100 million in interest. Dr. Gentz said GEFI would keep those commitments but would not discuss any other arrangements.

Mr. Witten described a June 30, 2000 meeting:

> On June 30, 2000, I attended another meeting with Deputy Secretary Eizenstat and other representatives of the U.S. Government at the U.S. Treasury Department in Washington, D.C. At that meeting Deputy Secretary Eizenstat again sought, unsuccessfully, to persuade German companies to generate interest in addition to the DM 100

> million. . . . Echoing what Dr. Gentz had said on June 12, I told Deputy Secretary Eizenstat that: German companies would not agree to transfer any funds until all cases had been dismissed; German companies had made a commitment to collect DM 5 billion in interest; German companies had not made any other commitments.

Dr. Gentz's Declaration described the June 12, 2000 meeting with Secretary Eizenstat, confirming Mr. Witten's account that he agreed that the German companies would pay only the DM 5 billion and the additional DM 100 million.

If these accounts are not true, Secretary Eizenstat is in a position to declare them false. He has not done so, either in his Declaration or in his book, which also does not address these discussions and the refusals of the Germany companies to pay more than DM 5.1 billion. Consequently, no factual issue exists. The Defendants' undisputed Declarations and the vast amount of documentary evidence support Defendants' account of what the German companies owe by way of interest and demolish the scenario that, with considerable ingenuity, Plaintiffs have created.

Were it the function of this court to decide the issue of the amount of interest Defendants owe by virtue of the Joint Statement, it would reject Plaintiffs' claims and grant summary judgment for the Defendants' on those claims.

C. *Schwartz-Lee Case Motions*: In their First Count, the *Schwartz Lee* Plaintiffs allege that in December, 1999, an agreement was reached requiring the German Government and German Industry including Deutsche Bank and Dresdner Bank, which are the only Defendants' in this case, to contribute DM 10 billion to the Foundation to terminate litigation pending in American courts against German defendants and to pay interest on this DM 10 billion. Plaintiffs rely on the December 13, 1999, letter Mr. Hausfeld wrote to Count Lambsdorff detailing the four demands Plaintiffs made upon the German side in addition to the DM 10 billion.

In his Declaration Mr. Hausfeld stated, "[t]he following day, December 14, 1999, Deputy Secretary Stuart Eizenstat telephoned me and told me that the German government and German Industry had accepted the December 13, 1999, offer. Mr. Eizenstat told me: 'Congratulations. The Germans have accepted. You have a deal.'" (Hausfeld Decl. Para. 76). On the basis of this Declaration and exhibits in evidence, the *Schwartz Lee* Plaintiffs have moved for a summary judgment that Defendant companies owe interest on their DM 5 billion share of the total settlement fund.

Defendants move to dismiss the First Count, a contract claim, for several reasons. First, the December correspondence could not form an agreement binding on the two Banks, because there is no allegation that any of the participants in the alleged correspondence and communications (Mr. Hausfeld,

Secretary Eizenstat and Count Lambsdorff) had the authority to act on behalf of the Banks or that any offer was even transmitted to or accepted by the Banks. Second, any offer that Mr. Hausfeld made that could have led to an agreement was specifically rejected by Chancellor Schroeder in his December 14, 1999 letter to President Clinton. Third, the documents post-dating December, 1999, that are attached to and cited throughout the *Schwartz Lee* complaint, establish that no binding agreement was reached in December, 1999.

In the Second Count of their complaint the *Schwartz Lee* Plaintiffs allege that "Defendants and/or GEFI made numerous representations of fact, including the representations that funds were being collected on schedule, interest would accrue on the DM 10 billion present value as of December, 1999, and payment in full had timely occurred, among others. Defendants and/or the German Industry Initiative made these representations to induce Plaintiffs to act and/or refrain from acting and knew or should have known that these representations were false. Plaintiffs justifiably relied on these representations." (Compl. Para. 86).

Defendants contend that this Count must be dismissed for the simple reason that the complaint fails to identify a single statement made by any representative of the Banks, any statement directly attributed to the Banks, or any misrepresentations of any kind relied on by Plaintiffs.

In support of their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Defendants rely upon the long recognized principle that a complaint should be dismissed if no relief could be granted, even accepting as true all the allegations and the reasonable inferences to be drawn therefrom. *Gasoline Sales, Inc. v. Aero Oil Co.,* 39 F.3d 70, 71-72 (3d Cir. 1994). As the United States Supreme Court has recently articulated:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted).

Applying New Jersey conflict of laws rules, Defendants concluded that the jurisdictions with an interest in the matter are Germany, for obvious reasons, and the District of Columbia, where some of the talks leading to the Berlin Accords took place. Defendants found no conflict in the laws of those two jurisdictions and argued that the laws of both those

jurisdictions required dismissal of both Counts of the *Schwartz Lee* complaint.

The court's rulings in the *Gross* case are dispositive of the motions in the *Schwartz Lee* case. First, and most important, is the determination that the language of the Joint Statement and the context in which it was negotiated establish that it is a political document and not a contract conferring on either the *Gross* case Plaintiffs or the *Schwartz Lee* case Plaintiffs the right to bring suit in the United States Courts. This requires denial of the *Schwartz Lee* motion for partial summary judgment, and it requires dismissal of the *Schwartz Lee* complaint in its entirety.

As in the *Gross* case, if the court is in error in its holding that the Joint Statement confers no rights that are enforceable in courts of the United States, it would proceed to the merits of the motions in each case. Because Defendants' motion to dismiss *Schwartz Lee* relies upon the vast array of documents that accompany the complaint, and because *Schwartz Lee* and *Gross* have been briefed and argued together in the same fashion as a summary judgment motion, the court will treat Defendants' motion to dismiss the *Schwartz Lee* complaint as a cross-motion for summary judgment.

There is no reason to repeat all the reasons for granting Defendants' motion for summary judgment in the *Gross* case. There, it was found that: No agreement to pay interest on the DM 10 billion was

arrived at in December 1999. In March, 2000, the German companies agreed to pay an additional DM 100 million, which, for specified reasons, was referred to as "interest." Prior to the signing of the Joint Statement on July 17, 2000, the German companies rejected every attempt of Secretary Eizenstat and the Plaintiffs' attorneys to include an interest component in addition to the obligation of the German companies to pay, DM 5.1 billion. In consequence of this negotiating history, Para. 4(d) of the Joint statement imposes no obligations on the German companies to pay, upon dismissal of the United States lawsuits, anything more than DM 5.1 billion.

The same evidence, or lack of it, applies to the *Schwartz Lee* claims. The Plaintiffs in that ease, in fact, are in an even worse position than the Plaintiffs in the *Gross* case. The *Schwartz Lee* Plaintiffs' claims rely primarily upon their contention that in December, 1999, the German side (German Government and German companies) agreed to pay interest from that date (and certainly from July 17, 2000) on the full DM 10 billion. This contention ignores everything in the post December, 1999 record that totally refutes it; it distorts the record in its reliance upon a quotation from *Imperfect Justice* taken out of context and in its reliance upon Mr. Hausfeld's attempt in his Declaration to expunge from the record Chancellor Schroeder's December 14, 1999 letter to President Clinton.

Of greater significance here is Secretary Eizenstat's failure to address Mr. Hausfeld's core allegation:

"[t]he following day, December 14, 1999, Deputy Secretary Stuart Eizenstat telephoned me and told me that *the German government and German Industry had accepted the December 13, 1999, offer*. Mr. Eizenstat told me: 'Congratulations. The Germans have accepted. You have a deal.'" (Hausfeld Decl. Para. 76). The contention that the German Government and German Industry accepted Mr. Hausfeld's proposal defies everything in the record. Secretary Eizenstat could have confirmed Mr. Hausfeld's account in his Declaration. His failure to do so speaks volumes.

There is no admissible evidence that contradicts the evidence that Defendants have produced in support of their contentions that (i) the December, 1999 understanding did not contemplate that the German side would pay interest on the DM 10 billion, (ii) the March, 2000 commitment to pay DM 100 million included no commitment to pay interest in addition to the DM 100 million, and (iii) the German companies thereafter rejected all demands to pay anything in addition to the DM 5.1 billion.

If this court were called upon to decide the merits of the *Schwartz Lee* claims it would deny the *Schwartz Lee* motion for partial summary judgment, and it would grant Defendants' motion for summary

judgment on both counts of the *Schwartz Lee* complaint.[11]

IX. Conclusion

The Joint Statement, upon which both the *Gross* Plaintiffs and the *Schwartz Lee* Plaintiffs base their claims, is a political document and not a contract conferring on Plaintiffs the right to bring suit to enforce its terms in the United States courts. Under the Berlin Accords, any relief for alleged departures from the Joint Statement must be sought by resort to German authorities or institutions or through resort to diplomatic means. This conclusion requires that the *Gross* Plaintiffs' and the *Schwartz Lee* Plaintiffs' motions for summary judgment be denied and Defendants' motion to dismiss the complaint in each case be granted.

Were it held that the Joint Statement conferred contractual rights upon the Plaintiffs in each case enforceable through lawsuits in United States courts, the court would convert Defendants' Rule 12(b)(6) motions to dismiss the complaints in the *Gross* and *Schwartz Lee* actions into Rule 56 motions. It would then deny the *Gross* Plaintiffs' and the *Schwartz Lee* Plaintiffs' motions for summary judgment and grant the Defendants' motions for summary judgment in

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[11] The court's findings with respect to the Count One claims of necessity remove any basis for the misrepresentation claim asserted in Count Two.

the *Gross* case and in the *Schwartz Lee* case, dismissing both cases with prejudice. The Court will enter an order implementing this opinion.

It is the court's expectation that nothing in this opinion will detract from the tireless activities of all the participants in the negotiations that, under the dedicated leadership of Secretary Eizenstat and Count Lambsdorff, led to the creation of the unprecedented Foundation, "Remembrance, Responsibility and the Future."

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

Dated: August 15, 2007

APPENDIX A

Portion of Roger M. Witten Declaration
Describing Proposals that GEFI Pay
Interest in Addition to DM 100 Million
Agreed to in March, 2000

At various other times prior to the signing of the Joint Statement on July 17, 2000, participants in the negotiations proposed language – all rejected by the German side – that would have called on German companies to provide more interest to the Foundation than the DM 100 million ultimately agreed upon in paragraph 4(d):

a. The U.S. Government circulated a draft dated March 16, 2000 (attached as Exhibit E) which proposed the following provision 5(c): "The German companies will place their DM 5 billion contribution in an interest bearing account." The proposed language was not agreed on; indeed, this language was removed in a revised draft (dated March 21, 2000, attached as Exhibit F) circulated five days later. A GEFI draft circulated eight days later (dated March 29, 2000, attached as Exhibit G) also made no reference to interest. No such language appeared in any subsequent draft circulated to German companies or in the Joint Statement as signed.

b. The U.S. Government circulated a draft dated April 4, 2000 (attached as Exhibit H) which proposed the following language in brackets: "In addition, interest will start to accrue as of the date of this declaration on funds already pledged by German companies." The use of brackets indicated that agreement had not been reached to include the bracketed language. This language was not agreed on and does not appear in the signed version of the Joint Statement.

c. An April 17, 2000 draft (attached as Exhibit I) included the proposed provision: "In addition, interest will start to accrue as of the date of this declaration on funds already collected by German companies." This language was not agreed on and does not appear in the signed version of the Joint Statement.

d. The U.S. Government circulated a draft which German companies received on April 25, 2000 (attached as Exhibit J). It included the proposed sentence quoted in subparagraph c above and added a new proposed sentence in brackets: "The companies will ensure that at least DM 100 million in interest on their DM 5 billion contribution will be made available to the Foundation." This language was not agreed on and does not appear in the signed version of the Joint Statement.

e. A May 12, 2000 draft (attached as Exhibit K) was circulated to the participants with the following proposed provisions in 4(d): "The DM 5 billion contribution of German companies shall be due and payable to the Federal Foundation once the lawsuits against German companies arising out of the National Socialist era or World War II pending in U.S. courts are finally dismissed with prejudice by the courts. Nevertheless, the German companies will make available reasonable advanced funding to provide appropriate publicity of the upcoming availability of Foundation benefits. German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM." The last sentence survived intact through all subsequent drafts and was included in the Joint Statement as signed.

f. A draft circulated by the U.S. Government on June 7, 2008 (attached as Exhibit L) proposed that

German company payments to the foundation should begin upon dismissal of all cases "or in any event no later than October 31, 2000." This language was not agreed on and does not appear in the signed version of the Joint Statement.

g. A draft circulated by the German Government on June 19, 2000 (attached as Exhibit M) deleted the clause "or in any event no later than October 31, 2000." The language "or in any event no later than October 31, 2000" was not agreed on and does not appear in the signed version of the Joint Statement.

h. A U.S. Government draft dated June 24, 2000, as discussed above (attached as Exhibit D), included the proposed sentence at the end of paragraph 4(d): "The DM 5 billion contribution of German companies will be collected in full and begin to earn interest no later than October 31, 2000." This language was not agreed on and does not appear in the signed version of the Joint Statement.

i. A German Government draft dated June 28, 2000 (attached as Exhibit N) deleted the sentence that the U.S. Government had proposed set forth in subparagraph h above. This deleted sentence ("The DM 5 billion contribution of German companies will be collected in full and begin to earn interest no later than October 31, 2000.") was not agreed on and does not appear in the signed version of the Joint Statement.

j. After the June 30, 2000 meeting referred to above, the U.S. Government circulated a draft dated July 7,

2000 (attached as Exhibit O), which reflected the discussion on June 30. First, the draft specified due dates for the German Government contribution and stated that contributions from the German Government to the Foundation would "begin earning interest for the benefit of the Foundation immediately upon being made available to the Federal Foundation." Second, the draft deleted the previously proposed language setting a deadline prior to dismissal of all litigation for payment of the German company contribution and the previously proposed language requiring interest to accrue on the German company contribution for the benefit of the Foundation as of some specified date.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLY GROSS, et. al., Plaintiffs, v. THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE; and ALLIANZ AG; BASF AG; BAYER AG; BMW AG; COMMERZBANK AG; DAIMLER CHRYSLER AG; DEGUSSA-HULS AG; DEUTSCHE BANK AG; DEUTZ AG; DRESDENER BANK AG; HOECHST AG; RAG AG; ROBERT BOSCH GmbH; SIEMENS AG; VEBA AG; THYSSENKRUPP AG; and VOLKSWAGEN AG, jointly and severally in their respective capacities as principals, founders, and alter egos of the GERMAN FOUNDATION INDUSTRIAL INITIATIVE, Defendants.	**CLOSED** Civ. No. 02-2936(DRD) **ORDER**
Barbara Schwartz Lee and Bernard Lee Plaintiffs, v. Deutsche Bank, AG, and Dresdner Bank, AG, Defendants.	Civ. No. 03-3181(DRD)

Plaintiffs in *Elly Gross, et al. v. The German Foundation Industrial Initiative, et al.,* (the *Gross* case) having moved for summary judgment; and Plaintiffs in *Barbara Schwartz Lee, et al., v. Deutsche Bank, A.G., et al.,* (the *Schwartz Lee* case) having moved for partial summary judgment; and the Defendants in both the *Gross* case and the *Schwartz Lee* case having cross-moved to dismiss the complaints in accordance with Fed. R. Civ. P. 12(b)(6) on the grounds that i) neither the Joint Statement executed on July 17, 2000, nor any part of it, is enforceable as a private contract, and ii) even if construed as a contract enforceable in the courts of the United States, the Joint Statement did not impose on defendants an obligation to pay to the Foundation Remembrance, Responsibility and the Future (the "Foundation) more than the DM 5.1 billion that Defendants have already paid; and the Defendants in the *Schwartz Lee* case having cross-moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the two counts of the *Schwartz Lee* complaint (for contract and for misrepresentation); and the court having reviewed the evidence submitted in connection with the motions and cross-motions and having heard the arguments of counsel; and the court having converted the *Gross* and *Schwartz Lee* motions to dismiss into motions for summary judgment; and the court having found that the Joint Statement is a political document that does not confer upon the private signatories thereto the right to assert contractual claims in the courts of the United States; and in the alternative, the court having found that should the Joint

Statement confer contractual claims upon the private signatories thereto enforceable in courts of the United States, the Joint Statement requires that Defendants in the *Gross* and *Schwartz Lee* cases pay to the Foundation no more than DM 5.1 billion in principal and so-called "interest;" and for the reasons set forth in an opinion of even date;

IT is this 15th day of August, 2007;

ORDERED as follows:

1. The *Gross* Plaintiffs' motion for summary judgment is denied.

2. The *Schwartz Lee* Plaintiffs' motion for partial summary judgment is denied.

3. The *Gross* Defendants' motion to dismiss the complaint (which has been converted into a motion for summary judgment) is granted, and the *Gross,* complaint is dismissed with prejudice.

4. The *Schwartz Lee* Defendants' motion to dismiss the complaint (which has been converted into a motion for summary judgment) is granted, and the *Schwartz Lee* complaint is dismissed with prejudice.

5. Costs are awarded against Plaintiffs.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLY GROSS, et. al., Plaintiffs, v. THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE; and ALLIANZ AG; BASF AG; BAYER AG; BMW AG; COMMERZBANK AG; DAIMLER CHRYSLER AG; DEGUSSA-HULS AG; DEUTSCHE BANK AG; DEUTZ AG; DRESDENER BANK AG; HOECHST AG; RAG AG; ROBERT BOSCH GmbH; SIEMENS AG; VEBA AG; THYSSENKRUPP AG; and VOLKSWAGEN AG, jointly and severally in their respective capacities as principals, founders, and alter egos of the GERMAN FOUNDATION INDUSTRIAL INITIATIVE, Defendants.	**ORDER AMENDING OPINION** Civ. No. 02-2936(DRD)
Barbara Schwartz Lee and Bernard Lee Plaintiffs, v. Deutsche Bank, AG, and Dresdner Bank, AG, Defendants.	Civ. No. 03-3181 (DRD)

The court having issued an Opinion dated August 15, 2007; and counsel having brought to the court's attention certain typographical and other errors in the Opinion;

It is this 6th day of September **ORDERED** that the Opinion is amended in the following respects:

Page 10, line 7: "million" shall read: "billion."

Page 11, line 8: "finding" shall read: "founding."

Page 27, lines 16-19: There shall be deleted from the list of corporations that filed jurisdictional motions: BASF AG, BMW AG, Commerzbank AG, Deutsch Bank AG, and Dresdner Bank AG.

Page 33, last line: "DM $100,000" shall read: "DM 100 million."

Page 53, last line: "state" shall be inserted before "Larry."

Page 62, line 4: The word "the" shall be added before the word "Future."

Page 62, line 6: an opening internal quotation mark shall be added before the word "Foundation."

Page 66, line 14: "Horst" shall read: "Klaus."

Page 73, line 9: "Graff" shall read: "Graf."

At Page 74, starting at line 9 of the second paragraph quoted from Mr. Witten's declaration, there shall be added the following between the words "billion" and "to:"

> contribution as of a certain date, and he suggested January 1, 2001. Dr. Gentz rejected that proposal and stated that GEFI had only two commitments: first to pay DM 5 billion

Page 98, line 13: "familiarly" shall read: "familiarity."

At page 119, in line 8 of the second paragraph quoted from Mr. Witten's declaration, there shall be added between the words "billion" and "in:" "and to earn DM 100 million."

At page 125 the first complete paragraph shall be amended to read as follows:

> To meet the eventuality that on appeal it might be held that the Joint Statement conferred contractual rights upon the Plaintiffs in each case enforceable through lawsuits in United States courts, the court will convert Defendants' Rule 12(b)(6) motions to dismiss the complaints in the *Gross* and *Schwartz Lee* actions into Rule 56 motions for summary judgment. It will deny the *Gross* Plaintiffs' motion for summary judgment and the *Schwartz Lee* Plaintiffs' motion for partial summary judgment and grant Defendants' motions for summary judgment in the *Gross* case and the *Schwartz Lee* case, dismissing both cases with prejudice. The Court will enter an order implementing this opinion.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
U.S.S.D.J.

APPENDIX D-1
THE BERLIN AGREEMENTS
THE JOINT STATEMENT

Joint Statement

on occasion of

the final plenary meeting

concluding international talks on the preparation

of the

Foundation

"Remembrance, Responsibility and the Future"

* * *

The Governments of the Republic of Belarus, the Czech Republic, the State of Israel, the Republic of Poland, the Russian Federation and Ukraine,

The Governments of the Federal Republic of Germany and the United States of America,

The German companies that founded the initiative to establish a foundation, which have since been joined by thousands of other German companies, and

As further participants, the Conference on Jewish Material Claims Against Germany, Inc. and the undersigned attorneys,

Recalling the proposal presented to the Chancellor of the Federal Republic of Germany by German companies on February 16, 1999, to send, as the century draws to a close, "a conclusive humanitarian signal, out of a sense of moral responsibility, solidarity and self-respect,"

Acknowledging the intention of both the Government of the Federal Republic of Germany and German companies to accept moral and historical responsibility arising from the use of slave and forced laborers, from property damage suffered as a consequence of racial persecution and from other injustices of the National Socialist era and World War II,

Recalling with appreciation the December 17, 1999, statement of the President of the Federal Republic of Germany paying tribute to those who were subjected to slave and forced labor under German rule, recognizing their suffering and the injustices done to them, and begging forgiveness in the name of the German people,

Affirming the consensus reached by all participants on December 17, 1999, at the 7th plenary meeting in Berlin on the establishment of the Foundation "Remembrance, Responsibility and the Future,"

Understanding that the Foundation is a sign of solidarity with the victims living in Central and Eastern European states and also a means of providing funds for victims from Central and Eastern

Europe, most of whom benefited little from prior German compensation and restitution programs,

Understanding that insofar as the sum of 10 billion DM to be made available by the German public sector and the German companies for the Foundation "Remembrance, Responsibility and the Future" is concerned, that sum is both a ceiling and the final amount and that all payments made towards former National Socialist slave and forced laborers, for other personal injury, for damage to property and for the Future Fund envisaged as part of the Foundation, as well as other costs incurred in connection with the Foundation, shall be financed from this sum, from any contributions from others, and the interest thereon,

Understanding that additional contributions by others for use by the Foundation are welcomed,

Recognizing that the Foundation will provide dignified payments to hundreds of thousands of survivors and to others who suffered from wrongs during the National Socialist era and World War II,

Accepting the common objective that German companies (including parents and subsidiaries as defined in Annex A) receive all embracing and enduring legal peace,

Recognizing that it would be in the participants' interests for the Foundation to be the exclusive remedy and forum for the resolution of all claims that

have been or may be asserted against German companies arising out of the National Socialist era and World War II,

Recognizing that the establishment of the Foundation does not create a basis for claims against the Federal Republic of Germany or its nationals,

Declare as follows:

1. All participants welcome and support the Foundation "Remembrance, Responsibility and the Future" and declare their agreement with its elements, including the annexed distribution plan (Annex B). The interests of the former forced laborers, other victims and heirs have been duly taken into account. Based on the circumstances, all participants consider the overall result and the distribution of the Foundation funds to be fair to the victims and their heirs. The Foundation opens up the prospect of payment being made, even if, 55 years after the end of the war, the wrongdoer can no longer be traced or is no longer in existence. The Foundation is also a means of providing funds for forced laborers in addition to payments made by Germany so far.

2. Given the advanced age of the victims concerned, the primary humanitarian objective of the Foundation "Remembrance, Responsibility and the Future" is to show results as soon as possible. All participants will work together with the Foundation in a cooperative, fair and non-bureaucratic manner to ensure that the payments reach the victims quickly.

3. Payments are to be made to applicants on behalf of the Foundation "Remembrance, Responsibility and the Future" irrespective of their race, religion and nationality. Insofar as the participants themselves distribute funds, they will base their decisions on the criteria of eligibility set out in the German law establishing the Foundation and will act justly in this regard.

4. The participating Governments and other participants will proceed as follows:

   a) The Government of the Federal Republic of Germany ("Germany") and the German companies shall each contribute DM 5 billion to the Foundation "Remembrance, Responsibility and the Future."

   b) Germany and the Government of the United States of America ("United States") will sign an Executive Agreement. Such agreement contains the obligation undertaken by the United States to assist in achieving all-embracing and enduring legal peace for German companies.

   c) The Governments of the participating Central and Eastern European States and Israel will implement the necessary specific measures within the framework of their national legal systems to achieve all-embracing and enduring legal peace.

   d) Assuming the request for a transfer referred to in paragraph (e) is granted, the DM 5 billion contribution of German companies shall be due and payable to the Foundation and

payments from the Foundation shall begin once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts including those listed in Annex C and D are finally dismissed with prejudice by the courts. The initial portion of the DM 5 billion German Government contribution will be made available to the Foundation by October 31, 2000. The remainder of the German Government contribution will be made available to the Federal Foundation by December 31, 2000. Contributions from the German Government will begin earning interest for the benefit of the Foundation immediately upon being made available to the Foundation. The German Government may advance some of its contribution to the partner organizations for certain start-up costs before the lawsuits are finally dismissed. The German companies will make available reasonable advanced funding to provide appropriate publicity of the upcoming availability of Foundation benefits. German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

e) Counsel for German company defendants and counsel for plaintiffs (each seeking to assemble at least a substantial majority of defendants' and plaintiffs' counsel respectively) have filed requests with the Multidistrict Litigation Panel seeking a transfer under

appropriate conditions to a mutually agreeable federal judge of the federal district court cases listed in Annexes C and D, for the purpose of implementing the other steps in this Joint Statement and in order to facilitate carrying out the objectives of the Executive Agreement by dismissing with prejudice the transferred cases and any later filed cases thereafter to be transferred as "tag-along" cases.

f) Germany will immediately establish a preparatory committee for the Foundation. The preparatory committee, after consulting with victims' representatives, will provide the publicity envisaged in paragraph (d) prior to the formal establishment of the Foundation, and, in consultation with partner organizations, prepare for the collection of applications for payment by the partner organizations.

g) The counsel for the plaintiffs will file motions or stipulations to dismiss with prejudice all lawsuits they have filed currently pending in U.S. courts against German companies arising out of the National Socialist era and World War II, including those listed in Annex C. They will also cooperate in seeking dismissal with prejudice by the courts of all other such lawsuits, including those listed in Annex D.

h) Germany and the United States will bring into force the Executive Agreement and the

United States will thereupon file the Statement of Interest as provided therein.

i) The German Government will encourage German companies to open their archives relating to the National Socialist era and World War II.

Done at Berlin on the seventeenth day of July of the year Two Thousand in a single original, copies of which will be made available to interested parties.

* * *

APPENDIX D-2
THE BERLIN AGREEMENTS
THE EXECUTIVE AGREEMENT

Agreement

between

the Government of the
United States of America

and

the Government of the
Federal Republic of Germany

concerning

the Foundation

"Remembrance, Responsibility
and the Future"

* * *

The Government of the United States of America

and

the Government of the Federal Republic of Germany

Intending to shape relations between their two States in a spirit of friendship and cooperation for the future and to successfully resolve issues stemming from the past,

Recognizing that the Federal Republic of Germany has, building on Allied legislation and in close

consultation with victims' associations and interested Governments, provided, in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution,

Noting the historic announcement on February 16, 1999, made by the Federal Chancellor and German companies, in which the companies stated their intention to establish a foundation to compensate forced laborers and others who suffered at the hands of German companies during the National Socialist era and World War II,

Noting that, by means of the Foundation Initiative, its member companies wish to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II,

Recognizing as legitimate the interest German companies have in all-embracing and enduring legal peace in this matter, and further recognizing that such interest was fundamental to the establishment of the Foundation Initiative,

Noting that the two Governments announced that they welcomed and support the Foundation Initiative,

Noting that the Federal Republic of Germany and German companies have since agreed on the creation of a single Foundation, "Remembrance, Responsibility and the Future" (the "Foundation"), formed under

German federal law as an instrumentality of the Federal Republic of Germany and funded by contributions from the Federal Republic of Germany and the German companies,

Recognizing that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies arising from the National Socialist era and World War II,

Recognizing that it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation,

Recognizing that both parties desire all-embracing and enduring legal peace to advance their foreign policy interests,

Noting in this regard the June 16, 2000, letter of the Assistant to the President of the United States for National Security Affairs and the Counsel to the President of the United States and the July 5, 2000, letter of the Foreign Policy and Security Advisor of the Chancellor of the Federal Republic of Germany, copies of which have been made public,

Having worked as partners, in consultation with other interested parties and governments, to assist German companies to achieve wide support for the total amount of funds and the eligibility criteria, of

the Foundation and for the establishment of all-embracing and enduring legal peace,

Noting that the Foundation will assure broad coverage of victims and broad participation by companies which would not be possible through judicial proceedings,

Believing that the Foundation will provide as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims,

Having in mind that the Foundation covers, and that it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II,

Recalling that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and the Federal Republic of Germany,

Noting that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts,

Recognizing that the German Government has tabled a Bill before the German Federal Parliament ("Bundestag") to establish the Foundation –

Have agreed as follows:

Article 1

(1) The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

(2) The Federal Republic of Germany agrees to ensure that the Foundation shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Foundation. The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

(4) The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be

agreed among the Foundation, ICHEIC, and the German Insurance Association.

Article 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

(2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Article 3

(1) This agreement is intended to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.

(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

(4) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim that may be asserted against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.

Article 4

Annexes A, B and C shall be an integral part of this Agreement.

Article 5

This Agreement shall enter into force on the date on which the parties agree by exchange of notes.

DONE at Berlin on the 17th day of July, 2000, in duplicate in the German and English languages, both texts being equally authentic.

For the Government of the United States of America

/s/ [Illegible]

For the Government of the Federal Republic of Germany

/s/ [Illegible]

Annex A

of the

Agreement

between

the Government of the United States of America

and

the Government of the Federal Republic of Germany

concerning

the Foundation

"Remembrance, Responsibility and the Future"

Principles Governing the Operation of the Foundation

Article 1(3) of the Agreement provides that the principles governing the operation of the Foundation will be set forth in Annex A. This Annex reflects key elements of the Foundation that form a basis for the Parties' mutual commitments in the Agreement.

1. The Foundation legislation will state that the purpose of the Foundation is to make payments through partner organizations to those who suffered as private and public sector forced or slave laborers and those who suffered at the hands of German companies during the National Socialist era and to establish a "Remembrance and Future Fund" within the Foundation. It will state that the permanent task of the "Remembrance and Future Fund" is to support projects that (a) serve to promote understanding between nations, and serve social justice and international cooperation in the humanitarian sector; (b)

support youth exchange programs and keep alive the memory of the Holocaust and the threat posed by totalitarian, unlawful regimes and tyranny; and (c) also benefit the heirs of those who have not survived.

2. The Foundation legislation will provide for a Board of Trustees that consists of an equal number of members appointed by the German Government and German companies and by other governments and victims' representatives except that the Chairman shall be a person of international stature appointed by the Chancellor of the Federal Republic of Germany. The Board may be reduced in size after four years, but the balance of the membership will continue to the extent appropriate. The Board will adopt by-laws by a two-thirds majority vote. All Foundation operations will be transparent and by-laws and similar procedures will be made public.

3. The Foundation legislation will provide that the Foundation will be audited by the Federal Accounting Office and that partner organizations will also be audited.

4. The Foundation legislation will provide that persons who were held in concentration camps as defined under the Federal Compensation Law ("BEG") or in another place of confinement or ghetto under comparable conditions and were subject to forced labor ("slave laborers") will be eligible to receive up to DM 15,000 each. The Foundation legislation will also provide that persons who were

deported from their homelands into the terri-tory of the 1937 borders of the German Reich or to a German-occupied area, and were held in prison-like or extremely harsh living conditions ("forced laborers") not covered by the above definition will be eligible to receive up to DM 5,000 each. In addition, from the allocated funds to make payments to forced laborers, partner organizations will be authorized to make payments to others who were forced to work during the National Socialist era. These other forced laborers will receive up to DM 5,000 each. The eligibility of all laborers covered by the Foundation will be limited to survivors and heirs, as defined under paragraph 8, of those who died after February 15, 1999. In addition, victims of "other non-labor personal injury wrongs," including, but not limited to, medical experimentation and *Kinderheim* cases, will be eligible to receive payments, within the limits of the amount allocated for that purpose. Victims of medical experimentation and *Kinderheim* cases are given priority over other non-labor personal injury wrongs. The eligibility of a victim to receive benefits for all "other non-labor personal injury wrongs" will not be affected by whether or not he or she also receives benefits for forced labor. The funds allocated for "other non-labor personal injury wrongs" will constitute a separate allocation. The partner organizations will receive, review, and process applications for payments from the amount allocated for "other personal injury." At the request of a partner organization, the property committee referred to in paragraph 11 will appoint an independent arbitrator to review and process

applications to the particular partner organization. The amount allocated will be distributed to each partner organization so that each approved applicant is provided a pro-rata amount of the total amount for all approved "other personal injury" applicants. The decisions of the partner organizations and any arbitrator that may be appointed will be based on uniform standards approved by the Board of Trustees. The Foundation legislation will provide that any costs associated with reviewing and processing applications, including those associated with an arbitrator (if selected), will be drawn from the allocations for each partner organization. Excess amounts in the labor category allocated to any partner organization under the distribution plan annexed to the Joint Statement will be reallocated to labor, with the aim of reaching equal levels of payments to former slave and forced laborers wherever they reside. The Board of Trustees will be entitled to authorize payments above per capita ceilings should circumstances warrant.

5. The Foundation legislation will provide that a slave or forced laborer will not be able to receive payments for the same injury or wrong from both the Foundation and the Austrian Foundation for Reconciliation, Peace and Cooperation.

6. The Foundation legislation will provide that persons who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies are eligible to recover under the payment system set forth in paragraph 11. The eligibility of such persons

will be limited to those who could not receive any payment under the BEG or Federal Restitution Law ("BRueckG") because they did not meet the residency requirement or could not file their claims by the deadline because they lived under a government with which the Federal Republic of Germany did not have diplomatic relations, those whose claims were rejected under the BEG or BRueckG where legal proof became available only after the reunification of the Federal Republic of Germany, provided the claims were not covered by post-reunification restitution or compensation legislation, and those whose racially-motivated property claims concerning moveable property were denied or would have been denied under the BEG or BRueckG because the claimant, while able to prove a German company was responsible for seizing or confiscating property, was not able to prove that the property was transferred into then-West Germany (as required by law) or, in the case of bank accounts, that compensation was or would have been denied because the sum was no longer identifiable, where either (a) the claimant can now prove the property was transferred into then-West Germany or (b) the location of property is unknown.

7. The Foundation legislation, by making available the amount of 50 million DM, will provide a potential remedy for all non-racially motivated wrongs of German companies directly resulting in loss of or damage to property during the National Socialist era. The Foundation will refer such matters for review and processing to the committee referred to

in paragraph 11. All funds allocated to payment for property matters will be distributed within those categories.

8. The Foundation legislation will provide that the heirs eligible to receive payments under paragraphs 6 and 7 consist of the spouse or children. In the absence of the victim, spouse and children, then payments under these paragraphs will be available to grandchildren, if alive; if not, to siblings, if alive; and if there are neither grandchildren nor siblings, to the individual beneficiary named in a will.

9. The Foundation legislation will provide that all eligibility decision will be based on relaxed standards of proof.

10. The Foundation legislation will provide that legal persons will be allowed to make claims on behalf of individuals when those individuals have given powers of attorney. The Foundation legislation will also provide that where an identifiable religious community has suffered damage to or loss of community property, as distinct from individual property, resulting directly from the wrongs of a German company, a duly authorized legal successor may apply for payment to the committee referred to in paragraph 11.

11. The Foundation legislation will establish a three-member committee for property matters (paragraphs 6 and 7). The United States and the Federal Republic of Germany will each appoint one member; these two members will appoint a Chairman. A

secretariat will be largely responsible for the initial review of applications. The Foundation legislation will require the Committee to establish simplified procedures, including simplified and expedited internal appeals. The Committee will not have the authority to reopen any case that has been finally decided by a German court or administrative body, or that could have been decided by application in time, except as specified in paragraph 6. All of the Committee's expenses will be funded from the amount allocated for property claims and the funds will be subject to audit.

12. The Foundation legislation will provide that the Committee referred to in paragraph 11 will distribute the funds allocated to it on a pro-rata basis.

13. The Foundation legislation will make clear that receipt of payment from Foundation funds will not affect the recipient's eligibility for social security or other public benefits. There will be offsets for prior compensation payments made by German companies for forced labor and other National Socialist era injustices, even if made through third parties, but there will be no offsets for any prior Government payments.

14. The Foundation legislation will provide that each applicant for a Foundation payment will be required to state that, upon receipt of a payment from the Foundation, he or she will waive any and all alleged National Socialist era claims against German companies and all National Socialist era labor and

property damage claims against the German Government. Such a waiver will not preclude applicants from being eligible to receive payments under the Foundation legislation for other wrongs, for example other personal injuries or loss of property, or any combination thereof. Such a waiver also will not preclude an applicant from bringing an action against a specific German entity (i.e., Government agency or company) for the return of a specifically identified piece of art if the action is filed in the Federal Republic of Germany or in the country in which the art was taken, provided that the applicant is precluded from seeking any relief beyond or other than the return of the specifically identified piece of art.

15. The Foundation legislation will provide that each partner organization will create an internal appeals procedure.

16. The Foundation legislation will require that the Foundation provide appropriately extensive publicity concerning the benefits that the Foundation will offer and how to apply. The Board of Trustees, in consultation with the partner organizations, will determine the form and content of such publicity.

17. The Foundation legislation will allow applications to be made to the partner organizations for at least eight months after the enactment of the Foundation law.

18. The Foundation legislation will authorize the Foundation and its partner organizations to

receive information from German Government agencies and other public bodies that is necessary for the fulfillment of their responsibilities, in so far as this is not contrary to particular statutes or regulations or the legitimate interests of the persons concerned.

19. The Foundation legislation will enter into force no later than when the funds of the Foundation are made available to it.

Annex B

of the

Agreement

between

the Government of the Federal Republic of Germany

and

the Government of the United States of America

concerning

the Foundation

"Remembrance, Responsibility and the Future"

Elements of U.S. Government Statement of Interest

Pursuant to Article 2, Paragraph 1, the United States will timely file a Statement of Interest and accompanying formal foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s)

to dismissal, in which the United States is notified that a claim has been asserted against German companies arising from the National Socialist era and World War II.

The Statement of Interest will make the following points:

1. As indicated by his letter of December 13, 1999, the President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to slave and forced labor, aryanization, medical experimentation, children's homes/Kinderheim, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies.

2. Accordingly, the United States believes that all asserted claims should be pursued (or in the event Foundation funds have been exhausted, should timely have been pursued) through the Foundation instead of the courts.

3. As the President said in his letter of December 13, 1999, dismissal of the lawsuit, which touches on the foreign policy interests of the United States would be in the foreign policy interests of the United States. The United States will recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence,

will be for the U.S. courts to determine). The United States will explain that, in the context of the Foundation, it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies. The United States will explain fully its foreign policy interests in achieving dismissal, as set forth below.

4. The United States' interests include the interest in a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; the interest in the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II.

5. The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution. It complements significant prior German compensation, restitution, and pension programs for acts arising out of the National Socialist era and World War II. For the last 55 years, the United States has sought to work with Germany to address the consequences of the

National Socialist era and World War II through political and governmental acts between the United States and Germany.

6. The participation in the Foundation not only by the German Government and German companies that existed during the National Socialist era, but also by German companies that did not exist during the National Socialist era, allows comprehensive coverage of slave and forced laborers and other victims.

7. Plaintiffs in these cases face numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs. The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.

8. The Foundation is fair and equitable based on: (a) the advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its fund, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by

the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.

9. The structure and operation of the Foundation will assure (or has assured) swift, impartial, dignified, and enforceable payments; appropriately extensive publicity has been given concerning its existence, its objectives, and the availability of funds; and the Foundation's operation is open and accountable.

Annex C

of the

Agreement

between

the Government of the Federal Republic of Germany

and

the Government of the United States of America

concerning

the Foundation

"Remembrance, Responsibility and the Future"

Definition of "German Companies"

"German companies" as used in Article 1(1) and Article 2(1), are defined as in Sections 12 and 16 of the legislation establishing the Foundation "Remembrance, Responsibility, and the Future," as follows:

1. Enterprises that had their headquarters within the 1937 borders of the German Reich or that have their headquarters in the Federal Republic of Germany, as well as their parent companies, even when the latter had or have their headquarters abroad.

2. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of the legislation establishing the Foundation "Remembrance, Responsibility and the Future," German enterprises as described in Sentence (1) had a direct or indirect financial participation of at least 25 percent.

3. "German companies" does not include foreign parent companies with headquarters outside the 1937 borders of the German Reich in any case in which the sole alleged claim arising from National Socialist injustice or World War II has no connection with the German affiliate and the latter's involvement in National Socialist injustice, unless there is pending a discovery request by plaintiff(s), of which the United States is provided notice by the defendant with copy to plaintiff(s), seeking discovery from or concerning World War II or National Socialist era actions of the German affiliate.

UNITED STATES OF AMERICA

Berlin, October 19, 2000

No. 1229

The Embassy of the United States of America presents its compliments to the Auswäriges Amt and has the honor to refer to Article 5 of the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility, and the Future."

The United States considers that the "Law on the Creation of a Foundation 'Remembrance, Responsibility and the Future,'" as promulgated on August 12, 2000, and as clarified and interpreted by the letters dated July 7, July 11, and July 14 from Otto Graf Lambsdorff, the Special Representative of the Chancellor of the Federal Republic of Germany, to the Deputy Treasury Secretary of the United States, Stuart E. Eizenstat, is fully consistent with Annex A to the Agreement.

On the basis of this understanding, pursuant to Article 5, the United States agrees that the Agreement shall enter into force today, the date the United States is exchanging notes with the Federal Republic of Germany.

The Embassy of the United States of America avails itself of this opportunity to renew to the

Federal Foreign Office of the Federal Republic of Germany the assurance of its highest t consideration.

Enclosure – Translation [SEAL]

APPENDIX E

EIZENSTAT DECLARATION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ELLY GROSS, et al.

Plaintiffs

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, et al.

D.N.J Civ. Action (02-2936) (DRD)

Defendants

DECLARATION OF STUART E. EIZENSTAT

Stuart E. Eizenstat, an attorney duly admitted to the bar of the United States Supreme Court and the District of Columbia, hereby declares:

1. I served from 1993-2000 as United States Ambassador to the European Union, Assistant Secretary of Commerce, Assistant Secretary of State and Deputy Secretary of the Treasury. I also served during this period as President Clinton's Special Envoy for Holocaust Restitution. I submit this petition in my capacity as a private citizen.

2. I led the United States delegation to, and co-chaired, the negotiations that culminated in the creation of the German Foundation "Remembrance,

Responsibility and the Future. I have described the negotiations in chapters 10-13 of Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003). I reaffirm the description of the negotiations set forth *Imperfect Justice.*

3. Throughout the negotiations, the principal aim of the Initiative was to attain "legal peace," which the Initiative defined as the dismissal with prejudice of all WW II-related cases pending against German industrial defendants in United States courts, and the consummation of an Executive Agreement between Germany and the United States providing German industry with a degree of protection against future similar litigation.

4. It is my firm recollection that sentence 7 of paragraph 4(d) of the Joint Statement of Principles, which reads:

> German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM

was intended to establish a minimum interest figure payable to the Foundation in connection with the deferral during the period needed to attain "legal peace" of the German Foundation Industrial Initiative's obligation to pay DM 5 billion to the Foundation. The language, which was carefully negotiated, was not intended to establish an interest ceiling, or to

describe an addition to principal. It was a highly contentious matter in negotiations and the understanding was carefully negotiated.

Dated: January 18, 2007
Washington, D.C.

/s/ Stuart E. Eizenstat
Stuart E. Eizenstat

APPENDIX F

LETTER OF WILLIAM KIRSCHNER DEPARTMENT OF JUSTICE

[LOGO] **U.S. Department of Justice**

Civil Division

901 E Street NW, Rm. 1010
Washington, D.C. 20530

William R. Kirschner
Trial Attorney

Telephone: (202) 616-2035
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July 22, 2002

VIA FACSIMILE

The Honorable William G. Bassler
United States District Judge
United States District Court
District of New Jersey
50 Walnut Street
Newark, NJ 07102

Re: *In re Nazi Era Cases Against German Defendants Litigation*, MDL No. 1337

Dear Judge Bassler:

It has come to our attention that there is a proceeding currently before you in which one of the issues is whether the German Foundation "Remembrance, Responsibility, and the Future" was fully funded with respect to the contributions owed by German companies, and, in particular, whether the German companies paid sufficient interest on their promised DM 5 billion contribution.

The U.S. Government has no independent information that conclusively resolves disagreements surrounding the interest issue. It is not in a position to say whether or not German industry has a commitment to provide additional funds beyond what has been transferred to the Foundation.

Sincerely yours,

/s/ William R. Kirschner
William R. Kirschner

cc: all counsel on attached service list (via facsimile)

No. 08-1106

FILED
APR 9 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ELLY GROSS, *et al.*,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' Questions Presented assume and incorporate some of their hoped-for answers. A fairer statement of their questions would be:

1. Whether the court of appeals' decision is contrary to *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 396 (2003), or any other decision of this Court or any court of appeals.

2. Whether the court of appeals' determination that the "Joint Statement" does not create any obligation enforceable in United States courts is inconsistent with *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008).

3. Whether, even if the Joint Statement did not create obligations enforceable in United States courts, petitioners' and respondents' actions consistent with the Joint Statement gave rise to an enforceable promissory estoppel.

PARTIES TO THE PROCEEDINGS

The correct name of the first-listed respondent is "German Economy Foundation Initiative" ("GEFI" or the "Initiative"). GEFI is an informal group of German companies and is not a legal entity. The other respondents in this Court, defendant-appellees below, are Allianz SE; BASF SE; Bayer AG; Bayerische Motoren Werke AG; Commerzbank AG; DaimlerChrysler AG (now known as Daimler AG); Deutz AG; Deutsche Bank AG; Dresdner Bank AG; Degussa AG (now known as Evonik Degussa GmbH); RAG AG; Robert Bosch GmbH; Siemens AG; ThyssenKrupp AG (successor by merger to, and sued herein as, Fried. Krupp AG, Hoesch-Krupp); and Volkswagen AG.

Respondents dispute petitioners' argumentative descriptions (Pet. ii) of the actions and relationships of the parties.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

Respondent Allianz SE has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent BASF SE has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Bayer AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Bayerische Motoren Werke AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Commerzbank AG has no parent corporation. Allianz SE is a publicly held company that owns 10% or more of its stock;

Respondent DaimlerChrysler AG, now known as Daimler AG, has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Deutz AG has no parent corporation. Same Deutz-Fahr Holding & Finance BV is a publicly held company that owns 10% or more of its stock;

Respondent Deutsche Bank AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Dresdner Bank AG's parent corporation is Commerzbank AG. Commerzbank AG, a publicly held company, owns 100% of the voting stock of Dresdner Bank AG;

Respondent Degussa AG, now known as Evonik Degussa GmbH, is a wholly owned subsidiary of Evonik Industries AG ("Evonik"). Evonik is owned by RAG Stiftung and Clear Vision Capital Fund Sicav-Fis S.A. ("CVC"). CVC consists of privately owned advisory entities that provide investment advice to and/or manage investments on behalf of investment funds. No publicly held company owns 10% or more of Evonik Degussa GmbH's stock;

Respondent RAG AG's parent corporation is RAG Stiftung, and no publicly held company owns 10% or more of its stock;

Respondent Robert Bosch GmbH's parent corporations are Robert Bosch Stiftung GmbH and Respondent Robert Bosch Industrietreuhand KG, and no publicly held company owns 10% or more of their stock;

Respondent Siemens AG has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent ThyssenKrupp AG as successor by merger to, and sued herein as, defendant Fried. Krupp AG, Hoesch-Krupp has no parent corporation, and no publicly held company owns 10% or more of its stock;

Respondent Volkswagen AG has no parent corporation, and Porsche Automobil Holding SE holds more than 10% of Volkswagen AG stock.

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IN THE

Supreme Court of the United States

No. 08-1106

ELLY GROSS, *et al.*,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Petitioners state (Pet. 5 n.6) that the district court's subject matter jurisdiction was "invoked in the lower courts under 28 U.S.C. § 1332(a)(2) ... and ... § 1331." The district court rejected Section 1331 jurisdiction because petitioners have not made any claim arising under federal law, *Gross* v. *German Foundation Industrial Initiative*, 320 F. Supp. 2d 235, 239 (D.N.J. 2004), and petitioners did not appeal this ruling. *See* Pet. App. 11.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case does not involve any provision of the Constitution, any treaty, or any U.S. federal or state statute, ordinance, or regulation. It does involve a statute enacted by the legislature of the Federal Republic of Germany on August 12, 2000 (the "Foundation Law"), which does not appear in the appendix to the petition and is set forth in the appendix to this brief.

Three pertinent documents are set forth at Pet. App. 224-254: (1) the "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Remembrance, Responsibility, and the Future,' " signed in Berlin on July 17, 2000, by, among others, eight Nations, representatives of certain claimants, and GEFI (the "Joint Statement"); (2) the "Executive Agreement Between the Government of the United States of America and the Federal Republic of Germany Concerning the Foundation 'Remembrance, Responsibility, and the Future,' " signed in Berlin on July 17, 2000 (the "Executive Agreement"); and (3) a letter from the United States Embassy in Berlin to Germany's Federal Foreign Office, dated October 19, 2000, confirming that the United States considers the Foundation Law, as clarified and interpreted, to be fully consistent with the Executive Agreement.

STATEMENT OF THE CASE

This case arises out of an international "diplomatic achievement" (Pet. App. 41) in 2000—the "Berlin Accords"—that by all accounts was "unique" (e.g., *id.* at 14, 71, 72, 73, 162). The decision below rests entirely on the specific wording, circumstances, and history of the documents comprising the Berlin Accords. The deci-

sion below did not resolve any question of federal law as none was presented. *See id.* at 11 n.2. Nor is it inconsistent with any decision of this Court or of any other court of appeals.

While some of history's most tragic events form the historical backdrop, the case itself lacks broad legal significance. In the 1990s, petitioners filed putative class actions seeking compensation for, *inter alia*, forced and slave labor for German companies during the Nazi period and World War II. These claims were not settled pursuant to Fed. R. Civ. P. 23. Some were involuntarily dismissed pursuant to Fed. R. Civ. P. 12(b)(6), while others were voluntarily dismissed as one step in international arrangements that also included Germany's creation of a German Foundation (as a sovereign instrumentality of the Federal Republic of Germany) to make specified payments (*see, e.g.*, Pet. 15 n.15) to Nazi victims as well as "fund ongoing projects to prevent religious and ethnic intolerance in Germany." Pet. App. 42. Petitioners do not assert that any payment promised to a Nazi victim was not made, but only that under Paragraph 4(d) of the Joint Statement German companies that had voluntarily contributed DM 5.1 billion (about $2.5 billion) in principal and interest to the Foundation owed additional interest to the Foundation. The Foundation and the German Government have concluded that no such interest was owing. *See* CAJA 351-354.

The decision below was correct, will result in no injustice to any petitioners, and does not present a recurring issue. The district court dismissed the claims, ruling that (1) the Joint Statement did not create obligations enforceable in U.S. courts, and (2) in any event, the Joint Statement did not call for any payment from defendants that has not been made. The court of ap-

peals affirmed on the first ground without reaching the second. The text of the Joint Statement and its history and context make clear that it was a statement of intentions, not a contract enforceable in the United States. German companies of course intended to collect and pay over to the Foundation the amounts specified—and they did. And there was abundant recourse against them if they had not. *See* pp. 17-18, *infra*. But it was the very essence of the arrangement that the German Government and a sovereign German Foundation would take responsibility for making "dignified payments" to Nazi-era victims and that claims for redress of any kind would be cognizable only in Germany and not in a U.S. court.

The district court's second ground for dismissal, not reached by the Third Circuit, was also correct: petitioners' various and inconsistent readings of the "interest" provision of the Joint Statement are without merit. As Judge Debevoise recognized, the whole history of the Joint Statement "support[s] [respondents'] account of what the German companies owe by way of interest and demolish[es] the scenario that, with considerable ingenuity, [petitioners] have created." Pet. App. 205.

A. The Berlin Accords

In March 1998, *Gross* petitioners' counsel filed a claim in the District Court for the District of New Jersey seeking "redress for the widespread use of slave labor by German industry during the Nazi period." Pet. App. 47. This filing was among "more than 60 additional cases throughout the United States." *Id.* In August 1998, twelve German companies (later joined by five others) that are respondents here formed GEFI, whose mission (as described by the district court (*id.* at 47)) was "to obtain all-embracing and enduring

legal peace for German companies by establishing and funding a German Foundation for making payments to certain victims of the National Socialist era and World War II that would be an instrumentality of the Federal Republic of Germany, governed by German institutions and not subject to oversight or review by United States courts."

The claims for redress had little prospect of being litigated successfully. For over 60 years the governments of Germany, the United States, and other countries have addressed such claims exclusively through diplomatic and intergovernmental means, and U.S. courts have uniformly dismissed such cases on various grounds. *See, e.g., Burger-Fischer* v. *Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000); *see also American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003).

Although GEFI's mission included seeking "legal peace" for German companies, "GEFI rejected the use of Rule 23, refusing to accept continued involvement of the United States courts and insisting that the institutions established to provide recompense had to be German and not subject to American oversight." Pet. App. 49. Accordingly, all of the cases were voluntarily or involuntarily dismissed as a result of the Berlin Accords.

The Berlin Accords consist of three related documents: (1) the "Executive Agreement between the United States and Germany," signed in Berlin, Germany, on July 17, 2000; (2) the "Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation 'Re-

membrance, Responsibility, and the Future,'" also signed in Berlin on July 17, 2000, by, among others, eight Nations, representatives of certain claimants, and GEFI; and (3) the Foundation Law, enacted by the German Bundestag on August 12, 2000.

(1) The Executive Agreement between the United States and Germany provided that Germany would enact the Foundation Law and described both the Law and the Foundation in detail. Pet. App. 236-237, 239-247. The Agreement stated that the Foundation would make "payments ... [to] those who suffered at the hands of German companies during the National Socialist era" and would also "support projects that ... serve to promote understanding between nations [and other humanitarian goals]." *Id.* at 239. The Agreement further provided that the Foundation would be subject to "supervision by a German governmental authority" to which "any person" could apply to assure compliance. *Id.* at 236.

The Executive Agreement also recognized as "legitimate" the interest of German companies, the United States, and Germany in "all embracing and enduring legal peace" with respect to Nazi-era claims. Pet. App. 234-235, 237. It stated that it was in the interests of both the United States and Germany "for the Foundation to be the exclusive remedy and forum" for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II. *Id.* at 237. To that end, the United States agreed (*id.*) that it would file Statements of Interest, described in Annex B to the Agreement (*id.* at 247-251), supporting dismissal of all pending and any future-filed cases against German companies arising out of the Nazi era and World War II.

(2) The Joint Statement stated that the German Government would "ma[ke] available to the Foundation" DM 5 billion in two tranches on October 31, 2000 and December 31, 2000.[1] Pet. App. 229. It stated that German companies would make a separate DM 5 billion contribution "once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts ... are finally dismissed with prejudice by the courts." *Id.* at 228-229. It described the total of these amounts, DM 10 billion, as "both a ceiling and the final amount." *Id.* at 226.

The Joint Statement "[a]ccept[ed] the common objective that German companies ... receive all embracing and enduring legal peace." Pet. App. 226. It stated that the nineteen signatories who were counsel to plaintiffs in pending cases "will file motions or stipulations to dismiss with prejudice all lawsuits they have filed currently pending in U.S. courts against German companies arising out of the National Socialist era and World War II." *Id.* at 230. "[P]laintiffs' lawyers agreed to dismiss with prejudice the numerous pending litigations, so that the victims would receive payment through the Foundation rather than civil actions and that the German companies would achieve 'all-embracing and enduring legal peace.' " *Id.* at 7. The Joint Statement also confirmed that the establishment of the Foundation "does not create a basis for claims against the Federal Republic of Germany or its nationals" (a term defined to include German companies). Pet. App. 227.

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[1] At the time, two German Deutschmarks were worth approximately $1.00.

(3) The Foundation Law enacted by the German Bundestag "establishe[d] the Foundation as the legal entity for processing claims and distributing the DM 10 billion fund." Pet. App. 9. The Law named the Foundation "Remembrance, Responsibility and the Future" (*see* App. 2a), provided for its governance, and committed its oversight to the German Federal Ministries of Foreign Affairs and Finance. App. 7a. The Law provided that German companies and the German Government would each make available DM 5 billion to the Foundation, and that "[t]here is no obligation for the donors to make supplementary payments." App. 3a. The Law confirmed that the German companies' payment would be made only after they received "adequate legal security." App. 22a. The Law also provided for the allocation of the Foundation's resources to Nazi-era victims and for other purposes in amounts adding up to DM 10.1 billion, of which DM 100 million was described as coming from "interest." App. 8a, 11a.

On October 19, 2000, the United States and Germany exchanged diplomatic Notes acknowledging that the Foundation Law "is fully consistent with Annex A to the [Executive] Agreement" and thus brought that Agreement into force on that date. Pet. App. 253.

B. Events Leading To The Present Dispute

After the Berlin Accords were in place, GEFI continued its efforts to raise DM 5 billion in voluntary contributions from German companies. On a parallel track, the plaintiffs' lawyers who were signatories to the Joint Statement cooperated in seeking consolidation of the pending cases against German companies—a step that would facilitate voluntary dismissal of those cases. On August 4, 2000, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated the pending federal dis-

trict court cases before Judges Bassler (D.N.J.), Mukasey (S.D.N.Y), and Kram (S.D.N.Y.).

The plaintiffs in the cases before Judge Bassler moved to dismiss voluntarily but—because those proceedings were occurring before German companies had finished raising the required amount and before German companies were due to transfer DM 5.1 billion to the Foundation—plaintiffs' counsel expressed concern that after the dismissals the Foundation might not receive its full funding. *Gross* v. *German Found. Indus. Initiative*, 456 F.3d 363, 370 (3d Cir. 2006). At plaintiffs' request, Judge Bassler included in each Order of Dismissal a provision stating that in the event of a funding shortfall, Fed. R. Civ. P. 60(b) would allow the judgments dismissing the cases to be vacated so that plaintiffs could pursue their claims. Judge Mukasey did the same.[2]

Judge Kram, however, repeatedly denied the plaintiffs' voluntary motions to dismiss the cases before her. Ultimately, on May 17, 2001, the Court of Appeals for the Second Circuit granted a writ of mandamus, compelling Judge Kram to dismiss the cases before her, and she complied on May 18 and 21, 2001.[3]

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[2] *See Winters* v. *Assicurazioni Generali S.p.A.*, Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y. Dec. 8, 2000).

[3] Petitioners assert (at 7) that the participants in the Berlin Accords anticipated a six-month period between the signings on July 17, 2000, and the dismissal of all cases, and that Judge Kram's refusal to dismiss caused an "unexpected" delay. There is no record support for this hypothesis, and both halves of it are demonstrably wrong. On July 17, Germany had yet to enact the Foundation Law, more than 60 cases were pending in both federal and

Following the dismissals, "[o]n May 30, 2001, the German legislature declared 'legal peace,' triggering the obligations of ... the German companies to ... pay DM 5 billion to the Foundation." Pet. App. 9.[4] GEFI then undisputedly did cause the "transfer[] [of] DM 5.1 billion, which included DM 100 million as the 'interest' designated in Paragraph 4(d) of the Joint Statement." *Id.*

C. Proceedings Below

1. The last sentence of Paragraph 4(d) of the Joint Statement (Pet. App. 229) states:

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state courts (some brought by lawyers who were not participants in the Joint Statement) (CAJA 260-288, Annexes to the Joint Statement listing cases), and the JPML had yet to act (or schedule a hearing) on motions to consolidate the cases pending in federal courts. *See* JPML Transfer Order 2, Dkt. No. 1337 (Aug. 4, 2000). But Judge Kram's special master had informed the parties two months earlier, on May 17, 2000, that Judge Kram would refuse to grant plaintiffs' anticipated motions to dismiss unless the Berlin Accords, then not yet signed, provided for additional payments in respect of certain claims in parallel but unrelated Austrian cases pending before her. *Gross* v. *German Found. Indus. Initiative*, 456 F.3d at 370 (citing *In re Austrian & German Bank Holocaust Litig.*, No. 98 Civ. 3938, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001)). The present petitioners' counsel were counsel in the proceedings before Judge Kram, and their assertion (Pet. 8) that her refusal to dismiss was "unexpected" is unfounded.

[4] Plaintiffs in thirteen cases had refused to dismiss their claims voluntarily (CAJA 284-288, Annex D to the Joint Statement), and some were not dismissed by the time the German Bundestag nevertheless declared "adequate legal peace" and German company payments to the Foundation began. Protracted appeals occurred in at least one case, *Deutsch* v. *Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

> German company funds will continue to be collected on a schedule and in a manner that will ensure that the interest earned thereon before and after their delivery to the Foundation will reach at least 100 million DM.

There is no dispute that GEFI delivered to the Foundation DM 5 billion plus DM 100 million in interest. Pet. App. 9. Nor is there any dispute that after delivery of the funds to the Foundation, they earned much more than DM 100 million in interest. CAJA 302.

2. Two different sets of plaintiffs, however, filed suit alleging (on quite different and inconsistent theories) that German companies owed a larger amount of interest. Pet. App. 9-10. The *Gross* plaintiffs filed a complaint in the District of New Jersey in June 2002, alleging that they were third-party beneficiaries of the Joint Statement and that the sentence quoted above imposed a contractual obligation on German companies to pay interest on DM 5 billion from July 17, 2000, the day the Joint Statement was signed, to the date of payment. *Id.* While petitioners' theory meandered during the course of the proceedings, as the claim is now articulated they assert an obligation to pay interest at 4%, allegedly the "going rate" in Germany. *See* Pet. 33. The *Schwartz Lee* plaintiffs filed a complaint in the same court in July 2003, naming respondents Deutsche Bank AG and Dresdner Bank AG and alleging that the interest obligation started seven months before the Joint Statement was signed, on December 14, 1999. Pet. App. 9-10. The *Schwartz Lee* claim was not based on Paragraph 4(d) of the Joint Statement but on an alleged oral agreement on December 14, 1999, that plaintiffs had teased out of a description of negotiation events that the district court found stunningly incomplete (*id.* at 105, 184-187). (It is not clear from the

Petition whether the *Gross* and *Schwartz Lee* petitioners continue to have inconsistent views of respondents' alleged obligation.)

3. Respondents moved to dismiss, contending, *inter alia*, that the cases were not "justiciable" and that no further interest was owed under either of petitioners' theories. Judge Bassler dismissed the cases as nonjusticiable, *Gross* v. *German Found. Indus. Initiative*, 320 F. Supp. 2d 235 (D.N.J. 2004) ("*Gross I*"), but the Third Circuit reversed, holding that there was no such constitutional obstacle to deciding the claims, *Gross* v. *German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006) ("*Gross II*"). The court of appeals posed two questions to be considered by the district court on remand:

> (1) is the Joint Statement, or part of the Joint Statement, enforceable as a private contract, and (2) if so, what "interest" obligation, if any, did the parties intend for the German Foundation Industrial Initiative?

Gross II, 456 F.3d at 387.

4. On remand, the cases were assigned to Judge Debevoise (Judge Bassler had retired). He considered both questions and in a comprehensive opinion ruled against petitioners on both grounds, either of which would be sufficient to require dismissal of their claims.

First, Judge Debevoise ruled that the "Joint Statement is a political document that does not confer upon the signatories, or any portion of them, contractual rights which can be enforced in United States courts." Pet. App. 45. His analysis focused both on general features of the Joint Statement and the other Berlin Ac-

cord documents, and on specific Joint Statement language. *Id.* at 160-172.

Judge Debevoise noted that the Joint Statement had been signed by eight sovereign nations as well as private parties, and that there is a general rule that international documents, even when they are agreements, do not create private rights of action. Pet. App. 166. He added, "The Joint Statement does not contain an explicit statement that it is privately enforceable.... The phrases of the Joint Statement that might be deemed to refer to future litigation rejected that possibility.... The Joint Statement contains none of the provisions that usually accompany an agreement that contemplates legal action to enforce the agreement, such as disputes clauses, choice of forum clauses, or choice of law clauses." *Id.* at 167-168. He noted that, consistent with this point, the Joint Statement was signed by officials *not* authorized to bind the United States and Germany (*id.* at 168), and that in this respect the Joint Statement contrasted with the Executive Agreement, which was signed the same day and place by the U.S. and German governments, by officials authorized to bind their respective countries (*id.*).

Judge Debevoise made a close analysis of the words of the Joint Statement. He noted, citing diplomatic precedents and international legal authority, that, as a matter of international practice, "[t]he very title of the instrument—Joint *Statement*—negates the creation of a legally binding agreement." Pet. App. 168 (emphasis in original). Judge Debevoise correctly observed that the designation "joint statement" is consistently applied to documents that "summarize a conference and express mutual intentions but do not establish legal obligations enforceable in any domestic court." *Id.* He pointed out that the Joint Statement refers to its signa-

tories as "participants" and never as "parties" (*id.* at 169); that throughout the document the participants "declare," rather than "undertake" or "agree" (*id.*). On this point he again drew a contrast with the Executive Agreement, signed the same day and place, which "is replete with language of 'agreement' from its title to constant use of the terms 'parties,' 'agree,' and 'agreed.'" *Id.*

Responding to petitioners' argument that the Joint Statement nevertheless contains a private contract enforceable against respondents, Judge Debevoise said: "In all this [Joint Statement language], there is nothing to suggest that the private lawyer signatories can extract from the comprehensive Joint Statement selected provisions for judicial enforcement." Pet. App. 169.

He also rejected petitioners' argument that the Joint Statement must be enforceable as a private contract or otherwise German companies could have accepted the benefits of dismissal and walked away from funding the Foundation. Reciting the history and provisions of the Berlin Accords, he said that "all the claimant participants relied on the power and persuasiveness of the United States and German Governments ... to ensure that any agreement arrived at would be adhered to." Pet. App. 170. (He did not need to note that, in the event of a funding shortfall, plaintiffs had the right to move to reopen their cases because the "agreed upon solution was to make all of the Court's dismissal orders expressly subject to Fed.R.Civ.P. 60(b)." *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 445 (D.N.J. 2002); *see In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 446-447 (D.N.J. 2000).)

Second, Judge Debevoise ruled that, if the Joint Statement were enforceable and the interest question were properly before him, he would grant summary judgment for respondents because "undisputed Declarations and the vast amount of documentary evidence" demonstrate that defendants had fulfilled all payment commitments to the Foundation. Pet. App. 205. He said the evidence "support[s] Defendants' account of what the German companies owe by way of interest and demolish[es] the scenario that, with considerable ingenuity, Plaintiffs have created." *Id.*

Judge Debevoise described (Pet. App. 178-205) the negotiating history of the "interest" sentence that had been set forth in declarations of Otto Graf Lambsdorff, the lead negotiator for Germany, and others, noting that "[t]here is no evidence whatsoever to contradict these declarations." *Id.* at 194. In particular, Judge Debevoise took note of the book and the declaration written by former Deputy Secretary of the Treasury Stuart Eizenstat, on which petitioners relied below as they do in this Court, and found that "[a]s far as it goes, [Mr. Eizenstat's] book is totally consistent with Defendants' view of the case." *Id.* at 200.

Judge Debevoise further found that in the negotiations Mr. Eizenstat, representing the United States, did make a series of *proposals* for interest to be paid on German company funds, including specific trigger dates for interest and proposals that the DM 5 billion be treated as a "present value," but each such proposal was firmly rejected by the German side, a fact Mr. Eizenstat nowhere disputes. *See* Pet. App. 195-205.

5. Both the *Gross* and the *Schwartz Lee* plaintiffs appealed, and the Third Circuit affirmed on the ground that "the disputed interest provision of the Joint

Statement does not constitute or confer a privately enforceable cause of action on the [petitioners] .... Because we agree with Judge Debevoise's rationale, we adopt it as ours, with some minor points as described herein." Pet. App. 5-6.

The court of appeals stated that "the law of international agreements provides the appropriate jurisprudential guidance in the analysis of whether the Joint Statement creates a private cause of action." Pet. App. 14. While acknowledging that "one objective was to settle then-pending U.S. litigation," it said that the Berlin Accords had "political, diplomatic and historical significance" and that senior officials of both the United States and Germany had been directly and intensively involved in negotiating it. *Id.* at 13-14. The court stated: "In sum, the Joint Statement appears to be a unique document, the objectives of which are to memorialize the efforts of the diplomatic talks resolving both political and legal issues." *Id.* at 14.

As was proper, the court of appeals looked first to the text of the Joint Statement (Pet. App. 15 (citing *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992))). The court "discern[ed] a strong intent" that it is "not enforceable through a private cause of action." *Id.* at 16. The court noted that all three documents constituting the Berlin Accords identify as a clear purpose that "German companies receive 'all-embracing and enduring legal peace.' " *Id.* (citing Executive Agreement, pmbl. ¶ 10 & arts. 2(1), 2(2), 3(1); Joint Statement, pmbl. ¶¶ 13, 4(b); Foundation Law, pmbl. [¶ 7]). The court also noted a number of other "textual clues" indicating a lack of private enforceability, including the Joint Statement's title, the use of the term "participants" rather than "parties," and the use of the term "declare" rather than "agree" or "undertake." *Id.*

The court of appeals rejected as "textual hairsplitting" petitioners' argument, renewed in this Court, that Joint Statement sentences containing "will" were nonbinding, while statements containing "shall" created private rights of action in U.S. courts. The court found that "the distinction is not borne out in the Joint Statement's text." Pet. App. 17-18. (The court might have added that the verb in the very sentence at issue, the last sentence of Paragraph 4(d), is not "shall" but "will," requiring petitioners to forge still another ad hoc theory. *See* Pet. 24.) The court also rejected petitioners' attempts to sever the "interest" sentence in Paragraph 4(d) of the Joint Statement from the rest of the document:

> In this case, the Joint Statement's language does not lend itself to the dichotomous approach urged by Appellants. Excision of a single sentence from the body of the Joint Statement, and from the entire Berlin Accords, invites departure from the participants' intentions.

Pet. App. 19.

The court of appeals flatly rejected petitioners' assertion that it would have been "an act of temporary insanity" for petitioners' counsel to have agreed to dismiss the suits for redress if the Joint Statement were not judicially enforceable. Pet. App. at 19. The court found that the participants agreed on a judicially unenforceable document because the Joint Statement "had the support and backing of the governments of both the United States and the Federal Republic of Germany." *Id.* at 19-20. Reliance on governmental and intergovernmental remedies was consistent with the half-century of diplomacy that the Berlin Accords expressly

state they culminate. *Id.* at 235. It also found that petitioners' assertion ran "counter to the undisputed fact that [petitioners] always retained the option to reopen litigation through Federal Rule of Civil Procedure 60(B)," concluding that:

> given the Foundation's procedure and the option under Rule 60(b), the participants to the Joint Statement exhibited, through the text and structure of the Berlin Accords, an intent not to legally bind other participants by a contractual right enforceable through U.S. litigation.

Id. at 20-21.

"[C]ognizant of the drafting environment," the court rejected Petitioners' unsupported assertion that the Joint Statement was intended to serve as a Fed. R. Civ. P. 23 settlement agreement. Pet. App. 21. Indeed, it concluded that "[i]f the contextual evidence does anything, it strengthens our belief that the participants to the Joint Statement did not contemplate an agreement which would require further legal wrangling in courts." *Id.*

The court of appeals also rejected as "misleading" petitioners' claim that "*Medellín* does away with any presumption against self-execution of treaties." Pet. App. 22. It said, "The Supreme Court recognized that, '[e]ven when treaties are self executing in the sense that they create federal law, the background presumption is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action.'" *Id.* at 23 (quoting *Medellín* v. *Texas*, 128 S. Ct. 1346, 1357 n.3 (2008)) (internal quotation marks omitted; alterations in original). Further, it is "the accepted

approach that, when no privately enforceable right is explicitly stated, 'courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action.'" *Id.* at 24 (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)).

Having found that the Joint Statement created no private right of action in a U.S. court, the court of appeals did not reach the second ground for dismissal decided by the district court, that defendants had fulfilled all payment commitments to the Foundation.

ARGUMENT

The courts below decided an issue that is unlikely to arise again in any U.S. forum, and they did so based on the specific words and uncommon circumstances of a unique set of documents, the Berlin Accords. The court of appeals' decision does not resolve any issue of federal law and does not conflict with any decision of this Court or any other court of appeals. Moreover, although the ultimate origins of this case lie in tragic events, the issues resolved below lack broad legal importance. The enforceability issue was correctly resolved below, and the result reached—dismissal of petitioners' claims—would also be required on an independent ground fully analyzed by the district court and not reached by the court of appeals. The case presents no question warranting this Court's review.

I. THE DECISION BELOW DOES NOT CONFLICT WITH *AMERICAN INSURANCE ASS'N* V. *GARAMENDI* OR ANY OTHER DECISION OF THIS COURT OR ANY COURT OF APPEALS

Petitioners' contention that the decision below conflicts with *American Insurance Ass'n* v. *Garamendi*,

539 U.S. 396 (2003), is, to be charitable, baseless. Nothing in *Garamendi* suggests that the Joint Statement created rights enforceable in a U.S. court. Indeed, *Garamendi* does not so much as mention the Joint Statement, by name or otherwise, except in a footnote stating that it "accompanied" the Executive Agreement and "recogniz[ed] that it would be in the participants' interests for the [German] Foundation to be the exclusive remedy and forum" for certain claims. *Id.* at 406 n.2 (internal quotation marks omitted).

Petitioners' assertion (Pet. 19) that "this Court enforced [the Berlin Accords] in *Garamendi*" is wrong. *Garamendi* involved a challenge to the California Holocaust Victim Insurance Relief Act ("HVIRA"), which required California insurance companies to disclose certain information about policies issued by German affiliates between 1920 and 1945. This Court stated that the issue was "whether HVIRA interferes with the National Government's conduct of foreign relations." 539 U.S. at 401. The respondents in that case[5]—and the United States—contended that HVIRA impermissibly interfered with the federal government's conduct of foreign affairs. This Court agreed, holding that HVIRA must "give way" to the "exercise of the federal executive authority" in the Executive Agreement with Germany and "the consistent Presidential foreign policy ... to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* at 421. The Court thus required California to yield to presidential *handling* of the problem; nothing in its decision sug-

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[5] No *Garamendi* respondent (or petitioner) is a party to these proceedings.

gests that it was "enforcing" the Berlin Accords (let alone the barely mentioned Joint Statement) against California; and nothing depended on whether the President had chosen to enter into an "enforceable" or an "unenforceable" Joint Statement.[6]

Petitioners do not assert that the decision below conflicts with any other decision of this Court, or any decision of any court of appeals. They do assert conflicts with two district court decisions, *Frumkin* v. *J.A. Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370 (D.N.J. 2001); and *Winters* v. *Assicurazioni Generali S.p.A.*, Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y Dec. 19, 2000), but the record in those cases unequivocally belies those assertions. *Frumkin* dismissed compensation claims for Nazi-era slave labor as posing constitutionally nonjusticiable political questions, not on the ground that the Joint Statement was enforceable as a private contract. *See* 129 F. Supp. 2d at 383-384. The court in *Frumkin* stated explicitly that "[t]he German Foundation does not form the basis for this dismissal; the political question doctrine and considerations of international comity do." *Id.* at 389. In other words, "[t]he question is not whether plaintiff's claims are barred by treaty, but whether his

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[6] Four Justices dissented, in an opinion by Justice Ginsburg, arguing that "no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA" and that California should not be required to yield on the point absent a "clear statement" from the federal executive. 539 U.S. at 430. Thus for the dissenters as well as the majority, the case turned on the relationship between federal Executive Branch and state policies, not on any question of contractual "enforce[ment]" of the Berlin Accords.

claims are such that they have been committed to the political branches for resolution." *Id.* at 378. In *Winters*, Judge Mukasey held that certain Swiss insurance companies were not covered by the Berlin Accords at all. He made a casual and inaccurate aside that the Berlin Accords "constitute, collectively, a settlement agreement," 2000 U.S. Dist. Lexis 18193, at *3, but he made no determination whether the Joint Statement is enforceable in a U.S. court, and nothing in his opinion suggests he thought anything turned on any such question.

II. PETITIONERS' VARIOUS ARGUMENTS ON THE MERITS OF THE ENFORCEABILITY ISSUE FURTHER ILLUSTRATE WHY THE CASE DOES NOT WARRANT REVIEW

Petitioners make several arguments that go to the merits of the enforceability issue. Each is wrong, and together they further illustrate why the intensely fact-specific decision below does not warrant this Court's review.

1. Petitioners assert that the Joint Statement is a "classic unilateral contract" (Pet. 22) (in some contrast with several assertions by the same counsel at earlier stages quite emphatically calling it a "classic bilateral contract." Pet. App. 66; *see also* CAJA 403, 1397. (Neuborne Decl. ¶ 52; transcript of May 25, 2004 oral argument)). But neither of the courts below—after scrutinizing the text of and unique circumstances surrounding the Joint Statement—was able to identify a single word suggesting that it is any sort of contract.

2. Petitioners attempt to find textual support for their unilateral contract theory based on how the Joint Statement uses the words "will" and "shall," claiming that the document subtly uses "will" to identify the un-

enforceable shared intentions and "shall" to identify the obligations that may become privately enforceable.[7]

The court of appeals rejected this contention after determining that in fact the document uses the words "interchangeably." Pet. App. 18. Moreover, petitioners face the embarrassment that the very sentence they claim gives rise to the "contractual" interest obligation they ask the courts to enforce, the last sentence in Paragraph 4(d), uses "will" three times, never "shall." They seek to solve this with an argument first made in this Court that there is a distinction between a

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[7] Petitioners misquote a U.S. State Department official who participated in the negotiation of the Berlin Accords, Ronald J. Bettauer, in support of this contention. In fact, Mr. Bettauer's unabridged statement only "support[s] the view of [GEFI] that the Joint Statement is a political document." *Gross II*, 456 F.3d at 385. Mr. Bettauer stated:

> As the negotiations came to a conclusion, we needed a document indicating what further steps it was agreed each participant would take. It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states. *We therefore developed a document that set forth political rather than legal commitments*—that is, undertakings that various participants "will" take various steps, rather than legal commitments that they "shall" do so. At this phase, we were once again involved in a negotiation with all the participants on the text of what became the "joint statement." This document set forth the undertakings of each party as to the steps it would take. This final aspect of the arrangement was more akin to a resolution that an international organization adopts. But this was not a negotiation in an international organization.

Bettauer, *Keynote Address—The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 Berkeley J. Int'l L. 1, 9 (2002) (emphasis added).

"declarative usage" and a "descriptive usage" (Pet. 24), but their argument depends, at the very least, on the sentence being "declarative," which places them on the wrong side of the divide. There is no reason for this Court to be the third court to consider this factual question concerning the intention of the parties.

3. Petitioners assert that international agreements with "domestic effect" may be "self-executing," citing *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), and a string of other cases. But, first, this ignores the fact that the issue below was whether the Joint Statement was an "agreement," rather than a "joint statement" of its participants' intentions understood not to be enforceable against anyone. And, second, it ignores this Court's recognition in *Medellín* "that, '[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.' " Pet. App. 23 (quoting *Medellín*, 128 S. Ct. at 1357 n.3 (internal quotation marks omitted; alterations in original).[8] Furthermore, the decisions below do

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[8] Petitioners cite 12 Supreme Court decisions. Six concerned formal treaties expressly stating that they were self-executing. *See Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 159 (1940) (General Inter-American Convention for Trade Mark and Commercial Protection (1929), Article 35); *Medellín*, 128 S. Ct. at 1365-1366 (citing the following cases as concerning explicitly self-executing treaties: *Clark* v. *Allen*, 331 U.S. 503 (1947); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176 (1982)); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (construing the Warsaw Convention, which "is a self-executing treaty"); *Olympic Airways* v. *Husain*, 540 U.S. 644 (2004) (same). Four others concerned only

not rest on generally applicable rules of treaty construction, but on the singular text and circumstances of the Joint Statement.

4. Finally, petitioners assert that there is an "estoppel" because both petitioners and courts dismissed their prior cases for redress in reliance on "respondents' repeated promises that they would comply with the financial bargain" assertedly made in the Joint Statement. Pet. 27. Passing the fundamental point that this argument identifies no remotely certiorari-worthy question, it has two gaping holes.

First, the issue in this case, as both courts below understood it, is whether the Joint Statement is a contract enforceable in U.S. courts or is, rather, a "political document" expressing the participants' intentions but "reli[ant] on the power and persuasiveness of the United States and German Governments to ensure that ... [it] would be adhered to." Pet. App. 170. If, as both courts below concluded, the Joint Statement was the latter, then, as both courts also concluded, it plainly was not *turned into* an enforceable contract merely be-

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preemption of state or municipal law by treaty obligations, not private enforceability. *See Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 235 (1796); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816); *De Geofroy* v. *Riggs*, 133 U.S. 258, 266 (1890); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924). The treaty at issue in *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268, (1909), expressly granted individuals a private right of action in U.S. courts. *Id.* at 273-274. The twelfth case, *Société Nationale Industriale Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987), did not deal with private economic relationships at all, but held that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555 (1970), "was intended to establish optional procedures [in U.S. courts] that would facilitate the taking of evidence abroad." *Id.* at 537.

cause participants later acted in accordance with their stated intentions, or because respondents' counsel later said truthfully that respondents would do so. In any event, this theory rests on the law of contract, probably that of the Federal Republic of Germany, or less likely that of a state of the United States, and does not present a federal question for this Court.

Second, what petitioners in fact sought as a remedy for any shortfall in Foundation funding was the right to move to reopen their cases under Federal Rule 60(b), which Judge Bassler explicitly confirmed at their request in the dismissal orders. If plaintiffs had enforceable contractual rights, there would have been no reason for them to insist on preserving the inferior right to move to vacate the dismissals under Rule 60(b). Moreover, Judge Bassler specifically rejected petitioners' contention that GEFI "induced this and other American courts to dismiss the relevant actions based on misrepresentations concerning its interest obligations." *Gross I*, 320 F. Supp. 2d at 248.

III. Denial Of The Petition Will Work No Injustice

Finally, petitioners argue (Pet. 30-34) that if they were allowed to prove their interest claim on the merits they could show that Paragraph 4(d) of the Joint Statement "impos[ed] an interest obligation (at the 4% statutory default rate), on respondents' unpaid principal balance during the ... deferral period [beginning at signing on July 17, 2000 and continuing for the time] needed to secure dismissal of the pending U.S. cases." Pet. 31. In a stratospheric flight of rhetoric, they assert that the lower courts' supposed refusal to let them prove this is a challenge to the "rule of law."

There was no error, there is no injustice, and the "rule of law" is not at risk. Judge Debevoise, after re-

ceiving and hearing argument on *petitioners'* motion for summary judgment on this theory (attaching extensive evidentiary material that included Mr. Eizenstat's declaration incorporating his book (Pet. App. 255-257)), ruled that the record "demolish[ed]" the theory (*id.* at 205), and noted for good measure that Mr. Eizenstat's "book is totally consistent with Defendants' view of the case." *Id.* at 200.

The merits of the interest issue are not before the Court: petitioners concede that "it is unlikely that this Court would wish to consider those issues at this time." Pet. 30. But an examination of the sentence in question (Pet. App. 229 (last sentence of Paragraph 4(d)), will reveal that it is wholly unlike the kind of interest rate provision petitioners are fabricating, and an examination of Mr. Eizenstat's declaration will reveal that he has in no sense endorsed petitioners' theory that there was such a provision implicit in the very different words of the Joint Statement. To quote the district court:

> [Respondents'] undisputed Declarations and the vast amount of documentary evidence support [respondents'] account of what the German companies owe by way of interest and demolish the scenario that, with considerable ingenuity, [petitioners] have created.

Pet. App. 205.

The Court may deny certiorari without fear that an injustice is being done.

IV. CERTIORARI SHOULD BE DENIED IN *SCHWARTZ LEE*

To the extent petitioners seek *certiorari* also with respect to the *Schwartz Lee* case, their petition has even less merit. The *Schwartz Lee* claim does not rely

on the Joint Statement but an alleged oral agreement supposedly reached in December 1999. The District Court correctly determined that there was no oral agreement reached in December 1999, relying, in part, on a "highly relevant" letter from German Chancellor Schroeder (Pet. App. 105) that plaintiffs' counsel, in an incident that Judge Debevoise could only call "extraordinary" (*id.*), sought "to conceal or camouflage." *Id.* at 131 n.6. Judge Debevoise correctly found that this alleged agreement "defie[d] everything in the record" (*id.* at 211) and that the fact that Mr. Eizenstat "could have confirmed" its existence, but did not, "speaks volumes." *Id.* Agreeing with Judge Debevoise, the court of appeals thus concluded that, "even if [it] were to vacate the district court's dismissal of the *Schwartz Lee* complaint" because, as petitioners wrongly assert, the Joint Statement in fact was privately enforceable, "the only logical outcome after remanding would be dismissal." *Id.* at 28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 6, 2009

APPENDIX

APPENDIX

The Law on the Creation of a Foundation "Remembrance, Responsibility and Future"

Preamble

Recognizing

that the National Socialist State inflicted severe injustice on slave laborers and forced laborers, through deportation, internment, exploitation which in some cases extended to destruction through labor, and through a large number of other human rights violations,

that German enterprises which participated in the National Socialist injustice bear a historic responsibility and must accept it,

that the enterprises which have come together in the Foundation Initiative of German Industry have acknowledged this responsibility,

that the injustice committed and the human suffering it caused cannot be truly compensated by financial payments,

that the Law comes too late for those who lost their lives as victims of the National Socialist régime or have died in the meantime,

the German Bundestag acknowledges political and moral responsibility for the victims of National Socialism. The Bundestag intends to keep alive the memory of the injustice inflicted on the victims for coming generations as well.

The German Bundestag presumes that this Law, the German-U.S. intergovernmental agreement, the accompanying statements of the U.S. Government as well as the Joint Declaration by all parties to the negotiations provide adequate legal security for German enterprises and the Federal Republic of Germany, especially in the United States of America.

With the concurrence of the Bundesrat, the Bundestag has passed the following Law:

Section 1: Establishment and Headquarters

(1) A legally recognized foundation with the name "Remembrance, Responsibility and Future" shall be established under public law. The Foundation comes into being as of the entry into force of this legislation.

(2) The headquarters of the Foundation shall be in Berlin.

Section 2: Purpose of the Foundation

(1) The purpose of the Foundation is to make financial compensation available through partner organizations to former forced laborers and to those affected by other injustices from the National Socialist period.

(2) A "Remembrance and Future" fund will be established within the Foundation. Its continuing task is to use the income produced by the means provided to the Foundation to foster projects that serve the purposes of better understanding among peoples, the interests of survivors of the National Socialist régime, youth exchange, social justice, remembrance of the threat posed by totalitarian systems

and despotism, and international cooperation in humanitarian endeavors. In commemoration and respect of those victims of National Socialist injustice who did not survive, it is also intended to further projects in the interest of their heirs.

Section 3: Donors and the Foundation's Capital Assets

(1) Contributors to the Foundation's capital fund shall be the companies joined together in the Foundation Initiative of German Industry, and the Federal Government.

(2) The Foundation shall be endowed with a capital fund consisting of the following:

1. Five billion deutschmarks that the companies joined together in the Foundation Initiative of German industry have agreed to make available, including the payments that German insurance companies have provided to the International Commission on Holocaust Era Insurance Claims or will provide in the future.

2. Five billion deutschmarks that the German Federal Government is making available in the year 2000. The contribution of the Federal Government includes the contributions of enterprises of which the Federal Government is sole owner or in which it has a majority interest.

(3) There is no obligation for the donors to make supplementary payments.

(4) The Foundation is authorized to accept contributions from third parties. It shall endeavor to obtain

additional contributions. The contributions are exempt from inheritance tax and gift tax.

(5) Income from the Foundation's capital fund and other income is to be used only for the purposes of the Foundation.

Section 4: The Bodies of the Foundation

The bodies of the Foundation are:

(1) the Board of Trustees.

(2) the Board of Directors.

Section 5: The Board of Trustees

(1) The Board of Trustees is made up of 27 members, namely:

1. the chairman, to be named by the German Chancellor;
2. four members to be named by the companies joined together in the Foundation Initiative of German Industry;
3. five members to be named by the German Bundestag and two by the Bundesrat;
4. one representative of the Federal Ministry of Finance;
5. one representative of the Ministry of Foreign Affairs;
6. one member to be named by the Conference on Jewish Material Claims against Germany;
7. one member to be named by the Central Council of German Sinti and Roma, the Alliance of

German Sinti, and the International Romani Union;

8. one member to be named by the Government of the State of Israel;

9. one member to be named by the Government of the United States of America;

10. one member to be named by the Government of the Republic of Poland;

11. one member to be named by the Government of the Russian Federation;

12. one member to be named by the Government of Ukraine;

13. one member to be named by the Government of the Republic of Belarus;

14. one member to be named by the Government of the Czech Republic;

15. one lawyer to be named by the Government of the United States of America;

16. one member to be named by the United Nations High Commissioner for Refugees (UNHCR);

17. one member to be named by the International Organization for Migration (IOM) in accordance with Section 9, Paragraph 2, Number 6; and

18. one member to be named by the Federal Information and Counseling Association for Victims of National Socialism e. V. [Registered Association].

The sending body may designate a substitute for each member of the Board [which it names].

A different composition of the Board of Trustees may be decided by a unanimous decision of the Board of Trustees.

(2) The term of office for members of the Board of Trustees shall be four years. If a member should resign before the end of his term, a successor may be appointed for the remainder of the term. The members of the Board of Trustees can be recalled by the sending body at any time.

(3) The Board of Trustees shall establish its own rules of procedure.

(4) The presence of half the membership of the Board of Trustees plus one shall constitute a quorum. The board shall make decisions on the basis of a simple majority. In case of a tie, the vote of the chairman shall determine the outcome.

(5) The Board of Trustees has the right to decide on all fundamental matters that have to do with the tasks of the Foundation, specifically with regard to budgetary plans, the annual report, and the existence of the specific characteristics referred to in Section 12, Paragraph 1. It monitors the performance of the Board of Directors.

(6) The Board of Trustees makes decisions regarding the projects of the "Remembrance and Future" Fund based on proposals by the Board of Directors.

(7) The Board of Trustees establishes guidelines for the use of resources insofar as their use is not already specified in this Law. In this connection, it

shall particularly endeavor to see to it that the partner organizations are able to draw in fair shares upon the eligibilities for payment referred to in Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2.

(8) Members of the Board of Trustees serve in a "pro bono" capacity; necessary expenses will be reimbursed.

Section 6: The Board of Directors of the Foundation

(1) The Board of Directors shall consist of the chairman and two additional members. Members of the Board of Trustees may not at the same time belong to the Board of Directors.

(2) The members of the Board of Directors will be named by the Board of Trustees.

(3) The Board of Directors shall direct the day-to-day business of the Foundation and shall implement the decisions of the Board of Trustees. It is responsible for distributing the resources of the Foundation to the partner organizations and for the management of the "Remembrance and Future" fund. It oversees the purposeful and prudent expenditure of the Foundation's funds, in particular adherence by the partner organizations to the provisions of this Law and the guidelines established by the Board of Trustees for the use of its funds. The Board of Directors shall represent the Foundation, both in judicial and extrajudicial matters.

(4) The details shall be determined by the by-laws.

Section 7: The By-laws

The Board of Trustees shall adopt a set of by-laws by a two-thirds majority vote. If a set of by-laws has still not been adopted within three months of the initial meeting of the Board of Trustees, the chairman shall propose a set of by-laws that will be passed by a simple majority. The Board of Trustees may amend the by-laws on the basis of a two-thirds majority.

Section 8: Oversight, Budget, Auditing

(1) The Foundation is subject to legal oversight by the Federal Ministry of Finance; starting with the second period in office of the Board of Trustees, it shall be subject to legal oversight by the Ministry of Foreign Affairs.

(2) The Foundation shall prepare a budget in timely fashion before the start of each fiscal year. The budget shall require the approval of the Federal Ministry of Finance.

(3) The Foundation shall be subject to being audited by the Federal Court of Audit. Without prejudice hereto, the Foundation's accounts and the management of its budget and finances are to be audited by the Federal Office for the Settlement of Open Property Matters.

Section 9: Use of Foundation Resources

(1) Resources of the Foundation that serve the purpose of the Foundation referred to in Section 2, Paragraph 1, will be allocated to partner organizations. They are to be used for one-time payments to persons eligible pursuant to Section 11, as well as for covering the personnel and non-personnel expenses

of the partner organizations. Persons eligible under Section 11, Paragraph 1, Sentence 1, Number 1 or Sentence 5 can receive up to 15,000 deutschmarks, and persons eligible under Section 11, Paragraph 1, Sentence 1, Number 2, or Sentence 2 can receive up to 5,000 deutschmarks. Receiving a payment under Section 11, Paragraph 1, Sentence 1, Number 1 or 2 does not preclude receiving a payment under Section 11, Paragraph 1, Sentence 1, Number 3 or Sentence 4 or 5.

(2) The partner organizations shall have available 8.1 billion deutschmarks including 50 million deutschmarks in accrued interest for payments to persons who suffered personal damage as referred to in Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2, and Section 11, Paragraph 1, Sentence 2, insofar as [the payments are] intended for compensation for forced labor. The total amounts shall be divided into the following maximum amounts:

1. for the partner organization responsible for the Republic of Poland, 1,812 million deutschmarks;

2. for the partner organization responsible for Ukraine and the Republic of Moldova, 1,724 million deutschmarks;

3. for the partner organization responsible for the Russian Federation and the Republic of Latvia and the Republic of Lithuania, 835 million deutschmarks;

4. for the partner organization responsible for the Republic of Belarus and the Republic of Estonia, 694 million deutschmarks;

5. for the partner organization responsible for the Czech Republic, 423 million deutschmarks;

6. for the partner organization responsible for the non-Jewish claimants outside the states referred to in Numbers 1 through 5 (the International Organization for Migration), 800 million deutschmarks; the partner organization must pay over up to 260 million deutschmarks of this amount to the Conference on Jewish Material Claims against Germany;

7. for the partner organization responsible for the Jewish claimants outside the states referred to in Numbers 1 through 5 (the Conference on Jewish Material Claims against Germany), 1,812 million deutschmarks.

The partner organizations must use these monies to make the stipulated payments for all persons who on February 16, 1999, had their principal domicile in their [the organizations'] individual regional areas of responsibility and on that date belonged to their material sphere of responsibility. The partner organizations referred to in Numbers 2, 3, and 4 are also responsible for those persons who on February 16, 1999, had their principal domicile in other states, which were republics of the former USSR; in each case that partner organization is responsible from whose area the claimant was deported.

(3) 50 million deutschmarks are intended for compensation of other personal injuries in connection with National Socialist injustice. Claims are to be addressed to the partner organizations referred to in Paragraph 2. These organizations shall determine the merits and amount of the damage claimed. The

amount of the compensation payments shall be determined by the Commission referred to in Paragraph 6, Sentence 2, in accordance with the ratio between the totality of the damages recognized by the partner organizations and the total amount of the monies referred to in Sentence 1, with due consideration given to Section 11, Paragraph 1, Sentence 5. The partner organizations may request the Commission referred to in Sentence 4 to assign the determinations referred to in Sentence 3 to an independent arbitrator. A partner organization that prefers not to make the determinations referred to in Sentence 3 itself must bear the costs of the arbitrator.

(4) The sum of one billion deutschmarks of the Foundation's monies is intended for payments to persons who suffered property loss. This amount is divided into the following maximum amounts:

1. 150 million deutschmarks for property losses resulting from persecution within the meaning of Section 11, Paragraph 1, Sentence 1, Number 3;

2. 50 million deutschmarks for other property losses within the meaning of Section 11, Paragraph 1, Sentence 4;

3. 150 million deutschmarks for the International Commission on Holocaust Era Insurance Claims to compensate unpaid or revoked and not otherwise compensated insurance policies of German insurance enterprises, including the costs incurred in this connection;

4. 300 million deutschmarks for social purposes to the benefit of Holocaust survivors through the Conference on Jewish Material Claims against Germany; 24 million deutschmarks of this shall be paid over to the partner organization referred to in Paragraph 2, Number 6, which shall use it for social purposes vis-à-vis the similarly persecuted Sinti and Roma;

5. 350 million deutschmarks for the humanitarian fund of the International Commission on Holocaust Era Insurance Claims.

(5) If additional interest is earned from the monies made available to the Foundation except for the monies intended for the Future Fund, up to 50 million deutschmarks of this shall be made available to the International Commission on Holocaust Era Insurance Claims to compensate insurance losses within the meaning of Paragraph 4, Sentence 2, Number 3, for foreign subsidiaries of German insurance enterprises and for costs incurred in this connection, as soon as the monies are available. Monies referred to in Sentence 1 and Paragraph 4, Sentence 2, Number 3, may also be used for the other purpose in each case.

(6) Claims for payments from the monies envisaged in Paragraph 4, Sentence 2, Numbers 1 and 2, are to be addressed to the partner organization referred to in Paragraph 2, Number 6, regardless of the claimant's residence. Determinations concerning these payments shall be made by a commission to be formed under this partner organization. The commission shall consist of one member each to be named by the Federal Ministry of Finance and the Department of State of the United States of Amer-

ica and a chairperson to be chosen by those two members. The commission shall establish supplemental principles concerning the content and procedure of its determinations, insofar as these are not already established under this Law or the bylaws. The commission shall rule on the submitted applications within a year after expiration of the application deadline. Sentences 3 and 4 apply, *mutatis mutandis*, to the appeals organ to be established in accordance with Section 19. The costs of the commission, the appeals organ, and the partner organization are to be covered pro rata from the total amount referred to in Paragraph 4, Sentence 2, Numbers 1 and 2. If the amount of damages recognized by the commission exceeds the monies available under Paragraph 4, Sentence 2, Number 1 or 2, the payments to be made are to be reduced in proportion to the available monies.

(7) 700 million deutschmarks including the interest accruing thereto are to be used for projects of the "Remembrance and Future" Fund. Of this amount, 100 million deutschmarks may be made available for other than its intended purpose, if well-founded requests are filed based on insurance claims that could not be met under Paragraph 4, Sentence 2, Number 3, and Paragraph 5.

(8) In concert with the Board of Trustees, the partner organizations may subdivide the category of forced laborers, within its quota, in accordance with Section 11, Paragraph 1, Sentence 1, Number 1, insofar as this involves persons interned in other places of confinement, as well as affected persons within the meaning of Section 11, Paragraph 1, Sentence 1, Number 2, into subcategories depending on the se-

verity of their fate and may set correspondingly gradated maximum amounts. This shall also apply to the eligibility of legal successors.

(9) The maximum amounts under Paragraph 1 may only be paid out for the time being in the amount of 50% for claimants under Section 11, Paragraph 1, Sentence 1, Number 1, and 35% for claimants under Section 11, Paragraph 1, Sentence 1, Number 2 or Sentence 2. Another payment of up to 50% of the amounts mentioned in Paragraph 1 for claimants under Section 11, Paragraph 1, Sentence 1, Number 1 and up to 65% of the amounts mentioned in Paragraph 1 for claimants under Section 11, Paragraph 1, Sentence 1, Number 2 or Sentence 2 shall be paid out after conclusion of the processing of all applications pending before the respective partner organization, to the extent possible within the framework of the available means. The partner organizations may set up a financial reserve for appeals under Section 19, in the amount of up to 5% of the monies allocated. To the extent the reserve has been set up, payment of the second installment under Sentence 2 may be made before the conclusion of the appeal proceedings. The Board of Trustees has the right, at the request of individual partner organizations, to allow an increase in the installment payments laid down under Sentence 1, insofar as it is assured that the monies allocated in Paragraph 2 are not exceeded.

(10) Payments under Section 11, Paragraph 1, Sentence 1, Number 3, with the exception of the payments of the International Commission on Holocaust Era Insurance Claims and payments under Section 11, Paragraph 1, Sentence 4 or 5 can take place only af-

ter all applications pending before the competent commission have been processed.

(11) Monies allocated under Paragraph 2 but not completely depleted are to be used for persons entitled to payments under Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2. Should the funds provided under Paragraphs 2 and 3 not be completely depleted in spite of payment of the maximum amounts under Paragraph 1, Sentence 3, the Board of Trustees shall decide how they shall be used. Just as in the case of the use of additional monies, the Board must compensate, in particular, any shortage incurred by individual partner organizations in making payments under Section 11, Paragraph 1, Sentence 1, Numbers 1 and 2. Monies referred to in Paragraph 4, Sentence 2, Numbers 1 and 2, which are not drawn down despite full compensation of damages shall go to the Conference on Jewish Material Claims against Germany; those referred to in Paragraph 4, Sentence 2, Number 3, to the International Commission on Holocaust Era Insurance Claims. The Board of Trustees may allow the maximum amounts under Paragraph 1, Sentence 3 to be exceeded if all partner organizations have been able to make payments in the amounts of these maximum amounts.

(12) Personnel and non-personnel costs shall be paid from the Foundation's funds, insofar as they are not to be assumed by the partner organizations in accordance with Paragraph 1, Sentence 2. The costs to be borne by the Foundation also include outlays for attorneys and counsel whose activity on behalf of persons entitled to payments under Section 11 contributed to the establishment of the Foundation

or otherwise were favorable to its creation, particularly by taking part in the multilateral negotiations that preceded the establishment of the Foundation or by filing complaints on behalf of claimants under Section 11 between November 14, 1990, and December 17, 1999. There is no legal claim to payments pursuant to Sentence 2. An arbitrator named by the Foundation will determine the allocation of an amount set by the Board of Trustees, based on guidelines that shall be determined and published by the Board of Trustees. Requests for the payments stipulated in Sentence 2 are to be submitted to the Foundation by the attorneys and counsel themselves and on their own behalf within eight months after publication of the guidelines. They must be accompanied by documentation of the outlays claimed. Every attorney and counsel shall make a declaration in the request proceedings to the effect that he waives any claims against his clients upon receipt of a payment under Sentence 2. He is under obligation to advise his clients that he has waived any claims.

(13) For pending litigation concerning matters covered in this Law, court costs shall not be levied.

Section 10: Distribution of Resources through Partner Organizations

(1) The approval and disbursal of one-time payments to those persons eligible under Section 11 will be carried out through partner organizations. The Foundation is neither authorized nor obligated in this regard. The Board of Trustees may decide for another mode of payment. The partner organizations shall cooperate with appropriate associations of persecutees and local organizations.

(2) Within two months after entry into force of the Law, the Foundation and its partner organizations are to publicize the possibility of compensation under this Law in an appropriate manner to all groups of eligible people in their respective countries of residency. These publications shall specifically include information about the Foundation and its partner organizations, the conditions on which compensation can be awarded, and application deadlines.

Section 11: Eligible Persons

(1) Eligible under this Law are:

1. persons who were held in a concentration camp as defined in Section 42, Paragraph 2 of the German Indemnification Act or in another place of confinement outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labor;

2. persons who were deported from their homelands into the territory of the German Reich within the borders of 1937 or to a German-occupied area, subjected to forced labor in a commercial enterprise or for public authorities there, and held under conditions other than those mentioned in Number 1, or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions; this rule does not apply to persons who because their forced labor was performed primarily in the territory of what is now the Republic of Austria can receive payments from the Austrian Reconciliation Foundation;

3. persons who suffered property loss as a consequence of racial persecution with essential, direct, and harm-causing collaboration of German businesses as defined by the laws on indemnification and who could not receive any payment or could not file their claims for restitution or compensation by the deadline because they either did not meet the residency requirements of the Federal Indemnification Act or had their domicile or permanent residence in an area with whose government the Federal Republic of Germany did not maintain diplomatic relations, or because they could not prove that an asset that had been expropriated due to persecution outside the territory of the German Reich in its 1937 borders and could no longer be located there, had been removed to the Federal Republic of Germany, or the proofs of the validity of their claims under the Federal Restitution Act *[Bundesrückerstattungsgesetz]* and the Federal Indemnification Act *[Bundesentschädigungsgesetz]* became known and available only due to German reunification, and the filing of the claims under the Law on the Settlement of Open Property Matters or the Law on Indemnification of Victims of Nazism was not allowed, or to the extent that restitution payments for monetary claims expropriated outside Reich territory were denied for lack of the possibility of assessing them, and no payments could be claimed either under the Currency Conversion Act, the Federal Indemnification Act, the Equalization of Burdens Act, or the Reparation Losses Act; that also applies to other persecutees within the meaning of the

Federal Indemnification Act; special arrangements within the framework of the International Committee of Holocaust Era Claims shall remain unaffected.

The partner organizations may also award compensation from the funds provided to them pursuant to Section 9, Paragraph 2 to those victims of National Socialist crimes who are not members of one of the groups mentioned in Sentence 1, Numbers 1 and 2, particularly forced laborers in agriculture. These awards, with reservation as to Section 9, Paragraph 8, must not result in any reduction in the payments to persons eligible under Paragraph 1, Sentence 1, Number 1. The funds provided for in Section 9, Paragraph 4, Sentence 2, Number 2 are intended to compensate property damage inflicted during the National Socialist regime with the essential, direct, and harm-causing participation of German enterprises, but not inflicted for reasons of National Socialist persecution. The funds referred to in Section 9, Paragraph 3, shall be awarded in cases of medical experiments or in the event of the death of or severe damage to the health of a child lodged in a home for children of forced laborers; in cases of other personal injuries they may be awarded.

(2) Eligibility shall be demonstrated by the applicant by submission of documentation. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant's eligibility can be made credible in some other way.

(3) Eligibility cannot be based on prisoner-of-war status.

(4) Payments from the Foundation are exempt from inheritance tax and gift tax.

Section 12: Definitions

(1) Specific characteristics of other places of confinement referred to in Section 11, Paragraph 1, Number 1 are inhumane prison conditions, insufficient nutrition, and lack of medical care.

(2) German enterprises referred to in Sections 11 and 16 are those that had their headquarters within the 1937 borders of the German Reich or have their headquarters in the Federal Republic of Germany, as well as their parent companies, even when the latter had or have their headquarters abroad. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of this Law, German enterprises as described in Sentence 1 had a direct or indirect financial participation of at least 25 percent are also considered German enterprises.

Section 13: Application Eligibility

(1) Awards under Section 11, Paragraph 1, Sentence 1, Numbers 1 or 2, or Sentence 2 or Sentence 5 are strictly personal and individual and must be applied for in one's own name. In a case where the eligible person has died after February 15, 1999, or where an award under Section 11, Paragraph 1, Number 3 or Sentence 4 is being applied for, the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no

grandchildren living, by the siblings. If no application is filed by these persons, the heirs named in a will are entitled to apply. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected. The claim to payment cannot be ceded or attached.

(2) Juridical persons shall not be eligible. They can file applications as representatives of their shareholders eligible under this Law if specifically authorized by these shareholders. If a religious community or organization suffered property losses with the essential, direct, and harm-causing participation of German enterprises, Sentence 1 does not apply to them or their legal successors.

Section 14: Cut-off Dates

(1) Eligibility pursuant to Section 11 can no longer be determined if an application has not been received by a partner organization by the end of 31 December 2001. This shall also apply if upon conclusion of processing by the respective partner organization within the meaning of Section 9, Paragraph 9, Sentence 2 the application forms, documentation and evidence required to take a decision on the application have not been received.

(2) Applications that are received directly by the Foundation or by an inappropriate partner organization shall be forwarded to the appropriate partner organization. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected.

(3) If an application has been filed within the application period specified in Paragraph 1 and if within six months after the death of the eligible person none of the persons eligible as legal successors pursuant to Section 13, Paragraph 1, Sentences 2 through 4 have notified the partner organization of their legal succession, the eligibility for an award shall expire. Paragraph 2 shall apply to the notification of legal succession *mutatis mutandis*.

Section 15: Treatment of Other Payments

(1) Payments for injustices suffered under National Socialism are supposed to benefit the persons eligible and not lead to a reduction of income received from the social security or health care system.

(2) Payments made earlier by enterprises in compensation for forced labor and other National Socialist injustices, even if made through third parties, shall be counted against payments under Section 9, Paragraph 1. Special arrangements within the framework of the International Commission on Holocaust Era Insurance Claims shall remain unaffected.

Section 16: Exclusions from Claims

(1) Payments from public funds, including social security, and from German business enterprises for injustice suffered under National Socialism as defined in Section 11 may be claimed only under the terms of this Law. Any further claims in connection with National Socialist injustices are excluded. This applies also to cases in which claims have been transferred to third persons by operation of law, transition, or a legal transaction.

(2) Each claimant shall provide a statement within the framework of the application procedure irrevocably renouncing, without prejudice to Sentences 3 through 5, after receipt of a payment under this Law any further claim against the authorities for forced labor and property damage, all claims against German enterprises in connection with National Socialist injustice, and forced-labor claims against the Republic of Austria or Austrian enterprises. The renunciation becomes effective upon receipt of a payment under this Law. Accepting payments for personal damage under Section 11, Paragraph 1, Sentence 1, Number 1 or 2, or Sentence 2 or Sentence 5 shall not mean the renunciation of payments for insurance or other property damage in accordance with Section 11, Paragraph 1, Sentence 1, Number 3, or Sentence 4, and vice versa. Sentence 1 does not apply to claims arising from National Socialist injustice committed by foreign parent companies with headquarters outside the 1937 borders of the German Reich without having any connections with their German subsidiaries and the latter's involvement in National Socialist injustice. Sentence 1 also does not apply to any claims to restitution of artworks, insofar as the applicant undertakes to pursue this claim in Germany or the country from which the artwork was taken. The renunciation also pertains to compensation of legal costs for the prosecution of the claim, insofar as Section 9, Paragraph 12, does not provide otherwise. The details of the procedure shall be determined by the by-laws.

(3) More extensive compensation arrangements and settlements of the consequences of war at the public expense shall not be prejudiced by the above.

Section 17: Transfer of Funds

(1) The Foundation is to make funds available quarterly to the partner organizations according to their documented need as outlined in Section 9, Paragraphs 2 and 3. The utilization of funds will be appropriately monitored by the Foundation.

(2) The first allocation of funds to the Foundation requires as a precondition the entry into force of the German-American Intergovernmental Agreement Concerning the Foundation "Remembrance, Responsibility and Future," and the establishment of adequate legal security for German enterprises. The German Bundestag shall determine whether these preconditions exist.

Section 18: Requests for Information

(1) The Foundation and its partner organizations are authorized to receive information from agencies and other public bodies that is necessary for the fulfillment of their responsibilities. Information will not be provided if this would be contrary to specific official regulations on the use of the information, or when justifiable protection of the interests of the party concerned outweighs the general interest favoring disclosure.

(2) The information received may be used only for the purpose of carrying out the goals of the Foundation, and an applicant's personal data may be used only for the grant procedure under Section 11. The use of these data for other purposes is admissible only with the express consent of the applicant.

(3) Applicants under this Law may request information from enterprises in Germany for which or for whose

legal predecessors they performed forced labor, insofar as this is requisite for determining their eligibility for awards.

Section 19: Appeals Process

The partner organizations are to create appeals organs that are independent and subject to no outside instruction. The appeals process itself is to be free of charge. However, costs incurred by the applicant are not to be reimbursed.

Section 20: Entry into Force

This Law enters into force on the date after its promulgation.

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In The Supreme Court of the United States

ELLY GROSS, et al.,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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INTRODUCTION

Respondents claim that this case does not warrant the Supreme Court's attention because the Berlin Agreements are unique. But, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), at the behest of one of the respondents,[1] the Court reviewed the effect of the Berlin Agreements on state regulatory power. Surely, the significance of legal issues arising under the Berlin Agreements does not turn on whether a respondent won or lost below, or on whether the Berlin Agreements are being enforced as a ceiling or a floor. Respondents also argue that no issue of federal law is present. But, the Berlin Agreements are so infused with national interest that their enforcement is governed by federal common law. See *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988).[2]

I. RESPONDENTS' PROMISES TO THREE FEDERAL JUDGES GENERATED A LEGALLY ENFORCEABLE OBLIGATION

Respondents promised three federal judges that they would comply with the financial commitments codified in ¶4 of the Joint Statement (including the

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[1] Five affiliates of respondent Allianz SE are listed as members of the American Insurance Association, the petitioner in *Garamendi*.

[2] Petitioners asserted jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1332(a)(2) (alienage) in both lower courts.

payment of "appropriate interest") if pending Holocaust-era cases were dismissed with prejudice.[3] In reliance on the promises, the three judges dismissed more than 60 cases. Respondents now claim that the courtroom promises were without legal effect, arguing that if the parties did not intend to make respondents' financial obligations judicially enforceable, respondents' subsequent promises to federal judges cannot render them judicially enforceable. Op. Cert. 25-26. Respondents confuse "implied in fact" contracts with contracts "implied in law."[4]

Virtually every exercise of quasi-contract or equitable or judicial estoppel involves an otherwise unenforceable promise that becomes judicially enforceable because the subsequent behavior of the obligor renders it unjust to fail to enforce the promise. In this case, respondents knowingly induced three federal judges to confer valuable legal benefits on them by promising to comply with the financial obligations

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[3] The promises are described in the Petition for Certiorari (Pet. 28-29).

[4] See 1 Williston on Contracts § 1:6 (4th ed. 2002):

> *There are two kinds of implied contracts, one implied* in fact and the other implied in law: the first does not exist unless the parties manifest mutual assent . . . while the second is quasi or constructive, and does not require mutual assent but is imposed . . . to enable justice to be accomplished, even when no contract was intended by the parties. . . . [I]t may even be imposed in the face of a clearly expressed contrary intent if justice so requires.

codified in ¶4 of the Joint Statement. Such promises, coupled with receipt of the valuable benefits the promises were designed to induce, generate an enforceable legal duty to abide by the courtroom promises in order to prevent unjust enrichment. See *Zedner v. United States*, 547 U.S. 489, 503-6 (2006) (discussing judicial estoppel); *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (distinguishing between contracts implied in fact and contracts implied in law).

In an effort to avoid the consequences of their promises, respondents quote Judge Bassler out of context. Op. Cert. 26. But Judge Bassler was merely noting that respondents' promise to pay "appropriate interest" does not bind them to accept petitioners' version of what constitutes "appropriate interest." Respondents also claim that they received little of value in return for their promises because the victims' legal claims were virtually worthless. Op. Cert. 5. Respondents even mischaracterize their multi-billion dollar payment to the German Foundation as a voluntary contribution. Op. Cert. 3. Respondents' claim that they should be viewed as voluntary donors is patently false. The victims' legal claims were deeply threatening to respondents, who made a calculated economic decision to buy "legal peace" for a "fair price."

For example, petitioner Elly Gross was the plaintiff in *Gross v. Volkswagen*, No. 98-4104 (D. N.J.), an action on behalf of slave laborers. Her substantive causes of action for restitution, prevention of unjust enrichment, and violation of customary

international law banning slavery and torture were enforceable in federal court. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The facts were provable through surviving records; the London Debt Agreement of 1953 tolled the running of applicable statutes of limitation; and *in personam* and subject matter jurisdiction was present. While Judge Debevoise ruled that that the 2+4 Treaty impliedly extinguished the victims' legal claims, *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D. N.J. 1999), lawyers for both the State and Justice Departments rejected Judge Debevoise's erroneous reading of the treaty, and were prepared to support petitioners' appeal.[5] Counsel herein withdrew the appeal with prejudice only after respondents promised to abide by their financial commitments in the Joint Statement.

II. RESPONDENTS ADVANCE AN EXCESSIVELY FORMALISTIC READING OF *GARAMENDI*

Respondents argue that *Garamendi* enforced the Executive Agreement, not the Joint Statement. Op. Cert. 20. But *Garamendi* was about conflict preemption – the displacement of one set of substantive norms by another. Since no substantive norms are codified in the Executive Agreement, the only source

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[5] See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 245-46, 270-74 (Public Affairs 2004).

of federal norms in *Garamendi* was the financial bargain codified in ¶4 of the Joint Statement. *Garamendi* holds that the Executive Agreement causes the terms of that bargain to displace California's more generous norms. In short, *Garamendi* enforced the Joint Statement as a ceiling.

III. RESPONDENTS' PRIVATE FINANCIAL PROMISES ARE NOT PRESUMPTIVELY UNENFORCEABLE

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), all nine Justices rejected a presumption against the judicial enforceability of private rights codified in international agreements. Nevertheless, respondents insist that their financial commitments are presumptively unenforceable because they are codified in a hybrid international document signed by both private parties and sovereigns. Op. Cert. 24. Read neutrally, in accordance with *Medellin*, the private economic nature of respondents' financial promises, coupled with the careful use of "shall" rather than "will" to describe respondents' financial obligations, demonstrate the parties' intent to render respondents' financial obligations legally enforceable.

The future tense is used 22 times in the Joint Statement, but the word "shall" appears only three times – each time as the only verb used to describe respondents' future financial commitments. "Will" is used to describe every other future event. It is highly unlikely that such a differential use of "shall" and

"will" is random. Respondents argue that the use of "will" to describe the accrual of interest during the deferral period demonstrates the randomness of the text. Op. Cert. 22-23. But respondents overlook the rules of grammar and usage. A sentence describing the future condition of an inanimate subject incapable of volition (funds collected by German industry "will") takes the verb "will." See Pet. App. 229d. A sentence setting forth the required future behavior of an animate subject capable of volitional action ("German companies shall") takes the verb "shall." See Pet. App. 228d.

IV. THE GERMAN FOUNDATION HAS NOT BEEN PERMITTED TO DECIDE WHETHER ADDITIONAL INTEREST IS DUE

Respondents' assertion (Op. Cert. 3) that the German Foundation has determined that no further interest is due is misleading. The German Foundation Law provides for a 27 member Board of Trustees. Op. Cert. App. 4a-5a. One Board seat is reserved for an attorney for the victims. *Id.* In August 2000, counsel of record herein was nominated by the United States as the lawyer-trustee.[6] In February 2002, counsel placed the interest issue before the Board of Trustees. J.A. 0393-95. In the midst of a spirited

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[6] In August 2004, counsel was re-nominated by the United States. In August 2008, counsel declined a third term, but agreed to complete this litigation.

Board debate, a representative of the German government notified the trustees that they lacked power to resolve the interest issue. *Id.* Respondents then obtained an opinion from a Foundation director that no additional interest is due. Directors, however, do not speak for the Foundation on this issue.[7] Moreover, the opining director was a former vice president of respondent Degussa AG, and had been a principal negotiator for respondents.

V. RESPONDENTS MISSTATE THE ROLE OF RULE 60(b) IN THE ENFORCEMENT PROCESS

Respondents argue that since every order of dismissal contains a proviso explicitly stating that it was subject to Rule 60(b), counsel viewed Rule 60(b) as a substitute for judicial enforcement. Op. Cert. 26. But respondents have it backwards. Rule 60(b) is not intended to address situations where the parties disagree over a material, but relatively minor aspect of a settlement. Moreover, since the power to vacate a dismissal exists in every case, formally referencing Rule 60(b) must have been intended to mean something more than the redundant right to invoke Rule 60(b). In fact, counsel hoped that it would satisfy the

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[7] German "directors" function like American corporate officers. They are elected by the Board of Trustees to manage the day-to-day affairs of the entity subject to Board supervision. See Foundation Law, §§ 5(5)-(7). Op. Cert. App. 6a (trustees have power over finances and all "fundamental matters").

requirements announced in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) by signaling a need for retained supervisory jurisdiction over the settlement agreement.

VI. JUSTICE HAS NOT BEEN DONE IN THIS CASE

Respondents assure the Court that justice has been done. Op. Cert. 26-27. But the district court's *sua sponte* summary judgment procedure was profoundly unjust. The district court conceded that its *sua sponte* summary judgment order violated the notice requirements of the federal rules, but insisted that the error was harmless. Pet. App. 173c.

Far from being harmless, the district court's failure to permit petitioners time to respond to its concerns unjustly deprived petitioners and Secretary Eizenstat of an opportunity to correct at least three crucial errors: (1) the district court's egregious misreading of the genesis of the interest obligation as set forth in *Imperfect Justice* at 254 (Pet. App. 185c-87c); (2) the district court's erroneous belief that Secretary Eizenstat's end-game negotiating strategy contradicted his sworn declaration (Pet. App. 195c-96c); and (3) the district court's erroneous claim that Secretary Eizenstat had failed to rebut respondents' assertions (Pet. App. 199c-201c). Petitioners were unable to correct these errors because Secretary Eizenstat's declaration was filed eight weeks *prior* to respondents' papers, and the court's scheduling order did not

permit additional filings. See Pet. App 199c-201c; J.A. 0203 (scheduling order).

At the close of oral argument, the district court declined petitioners' suggestion that Secretary Eizenstat be deposed. J.A. 2046-47. Justice requires an opportunity for Secretary Eizenstat to explain: (1) that there was, indeed, an agreement to pay "at least" DM 100 million in post-signing interest (*Imperfect Justice* at 254); and (2) that his end-game negotiating strategy was designed to checkmate respondents' last minute effort to re-open the interest issue that had been closed for months.

Nor was it just for the lower court to deny the victims access to a judicial forum without even discussing the precedential effect of *Garamendi*, or the legal consequences of respondents' promises to three federal judges that "appropriate interest" would be paid if the victims' Holocaust-era cases were dismissed with prejudice.

The Berlin Agreements are a remarkable achievement. The German Federal Constitutional Court demonstrated deep fidelity to the rule of law. Secretary Eizenstat and Graf Lambsdorff provided enlightened leadership. Respondents and the lawyers for the victim-petitioners bargained in good faith. The German Foundation has distributed more than $6.6 billion to more than 1.66 million victims, many of whom have found great solace in their treatment as equals under the rule of law. It is unfortunate that the parties have been unable to resolve this good

faith dispute over post-signing interest. But it would be tragic if the final chapter in the Berlin Agreements was a refusal to allow the victims a fair opportunity to resolve this dispute as dignified equals pursuant to the rule of law.

CONCLUSION

For the above-stated reasons, the petition for certiorari should be granted.

Respectfully submitted,

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